# JOURNAL

OF THE

# SOCIETY OF COMPARATIVE LEGISLATION.

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BY

JOHN MACDONELL, Esq., C.B., LL.D.

AND

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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# LORD WATSON.

LIVES spent in keen intellectual activity are often devoid of outward incident. Such was that of the late Lord Watson. He had no history, no personal ambition beyond that of leading a quiet country life. He was one of those

> who care not to be great,
> But as they serve or save the State.

The son of a Scotch minister, educated at Glasgow and Edinburgh, admitted an advocate to the Scotch Bar in 1851, he slowly won his way to recognition by his acuteness and assiduity. At forty-seven Mr. Disraeli rewarded his steady Conservatism by appointing him Solicitor-General for Scotland; two years later he became Lord Advocate. As such he conducted the prosecution of the Glasgow Bank directors. In 1880 he succeeded to the vacancy caused among the Lords of Appeal in Ordinary by the death of Lord Gordon. Once in his proper sphere, each year made more apparent the greatness of his judicial genius, until, when his career closed, it is not too much to say that he was reputed one of the most profound and accomplished lawyers in the three kingdoms. Many men in his position would have been content to occupy themselves with Scotch appeals only. Lord Watson was not. Accident had made him a Scotch lawyer; he set himself to study English law, and he attained to a mastery of its principles and a familiarity with the intricacies of its case law as great almost as that of Lord Blackburn; witness his judgments in *Nordenfeldt* v. *Maxim-Nordenfeldt Company*, 1894, A.C. 535; *Mogul Steamship Company* v. *M'Gregor*, 1892, A.C. 25; *Allen* v. *Flood*, 1898, A.C. 1. Mr. Bryce in his recent *Studies* dwells on the educational value of the civil law, on the good sense which distinguishes the Roman jurists, their large and liberal views of law, their philosophic spirit, and sense of historical development. Lord Watson was a striking example of the value of early training in the civil law. It furnished him, when he came to sit on the Judicial Committee, with the key to the legal puzzles constantly arising out of the systems of law which make up the legal mosaic of our Empire. "He was," says Mr. Haldane, addressing the Scots Law Society—"he was the Privy Council judge *par excellence*. His mind was wholly free from any tendency to technicality, and he never failed to endeavour to interpret the law according to the spirit of the jurisprudence of the colony from which the appeal came. If it was

a Cape appeal, he was a Roman-Dutch lawyer; if it was an Indian case of adoption, he entered into the religious reasons for the rule to be applied; if it was a Quebec case of substitution under the old French Code, or a Jersey appeal about the custom of Normandy, it was just the same. He imported none of the prejudices of the Scotch or English lawyer. In the House of Lords he was just as striking whether it was a Scotch appeal or an English case about some abstruse question of real property law. He was a great judge. For you his name will go down to posterity coupled with those of your great Scottish lawyers, the men of whom Inglis was the type. For us in England he will be recalled as one of the most superb judges that ever sat in the House of Lords. But the greatest memory of him will, to my mind, be that which must long be preserved in the distant colonies of the Empire, for which he was the embodiment, not only of a great legal intellect, but of absolute freedom from partisanship and of a passionate love of justice."

# THE CONSTITUTION OF THE EMPIRE AND THE DEVELOPMENT OF ITS COUNCILS.

[*An address delivered by the* Rt. Hon. R. B. Haldane, K.C., M.P., *at a meeting of the Society held at the Royal Colonial Institute, June 13th*, 1902.]

I will begin this paper by saying what I am going to try to do and what I am going to try not to do.

Among you are men who are engaged in actually moulding the Constitution of the Empire. If I venture to say to this meeting anything at all, it is, firstly, because a peg is needed on which to hang a discussion which will go much beyond the paper itself; secondly, it is because, although an unimportant watcher, I have been for nearly twenty years a close watcher of the growth of and increasing meaning of that Constitution which is more or less possessed in common by the different dominions of the Crown; I have observed as a student of constitutional law—I hope, if without bias towards the virtue of the mere student, at least without twist towards the vice of partisanship. So much for the study. But I have also seen a good many interesting things happen in my time, not only in the Imperial Parliament, but in the too little known laboratory of the Judicial Committee of the Privy Council. On these things I shall not dwell to-day, partly because I wish to make a virtue of necessity and be brief, and partly because in a little volume published recently I have ventured to reprint two discourses, one dealing with Federal Constitutions within the Empire, and the other with the political work of the Judicial Committee. I will, therefore, go straight to my point, and begin by seeking to express freely one or two not insignificant truisms.

**The Unwritten Type of Constitution.**—To begin with, the Constitution of the Empire, although it contains a number of subordinate Constitutions in different realms, contains them in process of being built up, and, as time elapses, more and more moulded in accordance with a common type. That type is unwritten and in consequence developing. The same traditions obtain in Australasia, in Canada, in South Africa, even to some extent in India. They are the outcome of a British way of looking at the relations of our executives to our legislatives. Even

when they begin in an apparently rigid Act of the Imperial Parliament, that Act turns out to have been a mere skeleton which has to be clothed with the flesh and blood of unwritten and growing usage if it is to have life. When such Acts have been successful, as in the case of the British North America Act of 1867 and the Australian Commonwealth Act of 1900, it is because they have been no more than the legal expressions of what was already potentially there, and because they were locally prepared and therefore ready for legal expression. When they have fallen flat, as in the case of the South African Confederation Act of 1877, it is because the Imperial Parliament had tried, with the best intentions, to make a legislative gift *ab extra* to people who had not at the moment asked for it and could not use it. The truth is, that more and more we are nearing the stage at which it will be realised that the Imperial Parliament in its relations to the self-governing dominions of the Crown can be, and ought to be, only a trustee of its powers. It is legally omnipotent, but in the reality of practice it is but an instrument for giving effect to the sense of the part of the Empire which calls for its interference. We have come to realise that if there are exceptions to this rule, it is only in cases where the interests of the Empire as a whole are mainly if not altogether concerned.

**The Trusteeship of the Imperial Parliament.**—Now this notion of trusteeship, a modern and important notion, is not, when looked at in the light of our unwritten traditions, a wholly novel one. We have several times worked out its application at home. Every student of constitutional history who takes the trouble to compare the immense powers of the Tudor sovereigns with those of the later sovereigns, who reign but do not govern, is familiar with the steps by which the monarchy has changed from an almost absolute one to a system in which the king has come to exercise his power in a fiduciary capacity. And this is not the only illustration. The House of Lords can to-day legally and theoretically amend a Money Bill. The Courts would be bound to recognise this power of amendment. But in practice a series of resolutions of the Commons, the effects of which are invisible to the merely legal eye, have abolished this power. They expressed the desire of the people of Great Britain, and because they did so the centre of political gravity became changed, just as in the analogous instance of the Crown, and the House of Lords has become bound by a series of silken bonds which are not the less binding because they are as invisible, except only to a tribunal which is not legal, as they are strictly of modern growth.

A similar process seems to be in course of development as regards the relations of the Imperial Parliament to colonial Governments. The last forty years have witnessed great changes, the outcome of which has been to do much to place colonial policy as well as general external policy outside the sphere of party contest in the home constituencies. It would to-day

be very nearly, if not quite, unconstitutional for a Minister to declare that the question of whether the Constitution, say, of Manitoba should be annulled was a question for the electors in the home constituencies. Thus the Imperial Parliament has become a very useful and unique instrument which has to be in these matters wielded by the Imperial Ministry in the interests of the Empire as a whole. And this is much more clearly so than it was half a century since, and it appears to be in progress of becoming yet better understood and defined.

**Imperial Federation by Organic Growth.**—These simple principles appear to me to have the closest bearing on the problem of what is called Imperial Federation. This phrase is an old one, proper, as I venture to think, only in a period when the trusteeship of Parliament and the growth of constitutional restrictions on the exercise of its powers were not known. It seems to assume that unless some sort of written and rigid Federal Constitution is proposed for the Empire, no provision for the necessity of combining self-government with the protection of purely Imperial interests is possible. Now I venture to think that what is aimed at by those who use the phrase "Imperial Federation" will come, and is actually coming, about in another and more familiar way—the way by which the balance in the home Constitution has been brought about, the way which is inscrutable to the mere theoretical lawyer, but which is familiar in the practice of our common Constitution. To preserve the Imperial Parliament as it is does not preclude great but unwritten changes in the principles on which power is balanced within the Empire. Organic growth can best proceed apart from mechanical interference. To bring that growth about, what you have to do is not to interfere *ab extra* with the life of the self-developing Constitution, the type on which it reproduces itself throughout the Empire, but to stimulate that growth by the clear setting in front of an accepted set of purposes. An end in course of being realised rather than a cause applied from without is the source of movement.

If, therefore, the distant parts of the Empire are to be brought into more close relation, it would seem that this must be not by heroic legislation by their various Parliaments, but by development of unwritten but highly binding usage to be brought about by concentration on common purposes. It is in the real councils of the Empire that these purposes will be presented, and the way of progress would seem to be in the main the development of real as distinguished from formal councils. Legislative changes may from time to time have to be made, but only to give effect to what has been already ripe for attainment, and not as causes of reform. The question to be answered is apparently, "What are the subject-matters with which the councils or conferences of the political guides of the various portions of the Empire must occupy themselves, in order to stimulate the organic growth of the whole?" The form counts for nothing; it is the reality that is of moment. The Imperial Privy Council is in form magnificent, but it is a

mere form to-day, devoid of reality. Yet the consultations which have taken place by cable between the Colonial Secretary and the colonial premiers, over the war and over other matters, have been of deep and lasting importance. If with more systematic opportunities and means the sense of certain common political interests, and consequently of common statesmanship, can be increased, surely such opportunities and means should be provided.

**Opportunities of Co-operation: Imperial Defence.**—It is plain that the exigencies of business must always make such conferences as are to take place this month and in July between the colonial and home Ministers necessarily of infrequent occurrence. But there are minor species of opportunity and means of change of ideas the importance of which has probably not been adequately estimated. If I do not refer to such great steps as the institution of a real supreme tribunal for the Empire, to which great disputes, legal and constitutional, would be relegated with a view to common and final interpretation, it is because I have dealt with this elsewhere. Nor do I pause over the fascinating theme of the subtle change which might be introduced into the Upper House of the Imperial Parliament if, by a sufficient power of creating life peerages, distinguished servants of the Crown in all parts of the King's dominions could be brought to feel that there was in process of evolution a permanent Imperial council-chamber in which they could express themselves. Nor am I for the moment thinking of conferences on such grave topics as special tariff relations within the Empire, or colonial contributions to the cost of the Army and Navy. These can in all probability only be discussed from time to time, and if in conference at all, in special and convened conferences of responsible Ministers. Apart from such topics there is a variety of matters which lie beyond, and in which the Empire as a whole has deep common interests and might have common policy. Take Imperial defence first of all. The training of soldiers and sailors, the formation of reserves, the pattern of armament, the schemes for mobilisation—these, for example, require neither hard-and-fast conventions nor surrender of liberty on the part of any legislature in the Empire. They are matters for experts to discuss in conference, and the advantage of uniformity of plans would be the real guarantee of the adoption of any scheme thoroughly thought out and agreed upon.

There exists what is called an Imperial Defence Committee of the Cabinet. Of this Committee it is not wonderful that we do not hear much, but it is remarkable that the visible fruits which it ought to produce appear to be but scanty. Imperial defence is a topic so grave, so far-reaching, so deeply concerned with the Empire beyond the seas, that it ought not to be left to the chances of the spare moments of Ministers. Here is a sphere in which continuity of policy, as distinguished from the fluctuating ideas which are the outcome of party vicissitudes, would appear to be possible. The

Imperial Defence Committee must stand in close relation to the Cabinet of the day, but it may do this and yet be a permanent body.

**A Representative Council: Work of the Society of Comparative Legislation.**—It does not surely pass the wit of man to devise a scheme for a council which, just because it is concerned with the life of the Empire at large, should contain expert members representative of the Empire at large, and independent of changes in the home Government. Again, take the work of the very Society under the auspices of which I am making these remarks. What can be more desirable than that, in framing legislation in the different dominions of the King, his advisers should have before them a complete survey of what is being done in the other parts of the Empire, and opportunity of requisitioning the highest legal talent? To some extent the Society does this work. On its Council are some of the most distinguished lawyers and statesmen of both Smaller and Greater Britain. It publishes a journal in which the legislation of the Empire is periodically surveyed and compared, and the most difficult and constitutional problems are discussed. But, after all, it is but a private body with very limited means at its disposal. Were its place taken by a special council, whose members had the work entrusted to them of constantly corresponding, and exchanging ideas and accumulating material in a form rendered available and widely made known, a great stimulus would be given to law reform and to simplification and uniformity of code. Again, look at education, and particularly the devising of arrangements whereby it should no longer be necessary for students from the home and colonial universities and colleges to go outside the Empire for the post-graduate technical training and research work which they have at present to pursue, for lack of British organisation, in the universities and technical schools of the Continent and the United States.

**Systematic Co-operation.**—Turn, again, to the department of commercial intelligence. We are better off than we were some years since, but we are still sadly deficient in the organised provision of information as to markets, commodities, and modes of manufacture. In all these, and a dozen other special subjects, there is a want of system and co-operative organisation in the Empire which ought not to continue. Such topics as trade mark, copyright, and naturalisation suggest possibilities of uniformity which are but imperfectly realised at the present time. This organisation need not proceed wholly from the different Governments. But surely these Governments would exercise a potent influence in stimulating and developing it if they were to be represented by experts on councils, whose business it was to exercise a fostering care in such matters. Much can be done by individuals, but there are some things that can be done by Governments alone. Such systematic co-operation under the eyes of the various bodies of the rulers of our common race would probably tend to develop rapidly that sense of the interests of the Empire as an organic whole which is already moulding the policy of the Imperial Parliament, and which has so

strikingly directed to a common focus the policies of most of the Parliaments of the Empire through the South African crisis.

What I am suggesting is that common purposes, even in what seem to be particular and separable matters, are potent for general unification—far more potent in reality than constitutional changes of a written and rigid order, which tend to restrict local freedom from without. Whether the moment has come at which it is open to the representatives of the various Governments of the Empire to confer with a view to systematically mapping out a field for this sort of organisation, and for the delegation of the work to proper councils, it is for statesmen to say. But it seems to me that if it were practicable to do this, the consequences might be very large and beneficial. The tendency to draw together which can be the outcome only of a common intelligence and a common will would surely set in on a great scale, as the result of a system in which there should be no compulsion other than the rational choice which follows on adequate knowledge.

A policy, then, of conference on a greatly extended scale—conference not less real because much of it would be done by the systematic exchange of ideas between persons at a distance—appears to me to be the next step in the direction of Imperial unification. The time seems to be rapidly ripening for steps to be taken in advance of any that have yet been taken. They might be followed by legislation, possibly by legislation in the direction of changes in Imperial and local Constitutions. But if they were, such legislation would come, not as an artificial alteration from without, but as the natural expression of the changing form which the Time Spirit had brought about. And this is certain that, after the true fashion of people who are pervaded by our principles and traditions, the greatest changes in the future, as in the past, would be those made under existing forms, conserved in their venerable appearance, but with the substance profoundly modified.

**The Empire as an Organic Whole.**—Under the old forms the centre of power is shifting to-day. In the past it has shifted first from the Crown to the Imperial Parliament, and then from the House of Lords to the House of Commons. To-day it is shifting, so far as Imperial questions are concerned, under the influence of a new conception of the Empire as an organic whole, with a common life and end pervading and guiding the action of all its members. No longer do we think of our colonies as governed from Downing Street. Downing Street is but the ganglion in which the stimulus derived from contact in different parts is translated into movement in the interest of the common life. The Empire is an entirety, and it is not the home constituencies which elect the House of Commons that are coming to control it. Downing Street co-ordinates and adjusts, say, the impulses to action in South Africa for a great common interest which come from New Zealand. But Downing Street is no more absolute master than is the nervous centre—which cannot exist apart from

the nerves and muscles and the rest of the living system. The conception of a living organism is a nearer analogy than that of a machine guided by an outside hand. And the aim of that life must be to ensure the healthy freedom in co-operation of the parts. That must be the goal of any so-called federal policy.

**Stimulating Growth.**—Such a policy is one of stimulation of growth and not of mechanical alteration. It may be none the less effective because it requires time for its accomplishment. Its foundation must be clear ideas and steady purposes. Our nation has reached a critical period in its history. Its wealth has not ceased to grow, nor does its importance among the races of mankind diminish. But it is face to face with new rivalries, directed by scientific methods. Well, we in our turn must learn to think and to be more scientific than has been our wont. Our critical period lies not improbably in the half-century that is in front. If the genius of our race can hold through these years the position of Lesser Britain in the world, their close may witness strong children grown up and surrounding in their strength the Mother Country in a powerful family united in a common life. The war now happily closed has done much to help to this. I believe that we have all emerged more serious, more enlightened, more strong, because unshaken nerve and resolution has to-day, as with our forefathers of yore, brought the nation to victory through a great struggle.

What we have now to do is to learn to think clearly. It is the commercial position of Great Britain that gives me most anxiety. We have now no natural advantages—no excess of cheap coal and cheap iron. We have built up a huge national income under a steady policy of encouraging, in a fashion that has no parallel, the import of a profusion of untaxed raw material to work up into manufactured goods, and of cheap food to maintain our workers. That may be a policy not unattended with risk. But I know not how that risk is to be obviated when I reflect that three-fourths of our trade consists in the exchange of commodities with people other than our colonists. I desire to prejudge no issue when I ask those who would reverse this policy to think long and well before they embark on an unmapped sea. There are great temptations, but it is the business of statesmen to weigh well possible consequences before they yield to clamour. No doubt there is a sense in which the laws of motion are ancient shibboleths, but, their venerable triteness notwithstanding, they are as true to-day as they were a century since. We all want to do what suits the colonies, but in grave matters such as these what suits the colonies best is to preserve intact the strength of the home country. It is less a question of to-day than of to-morrow and the day after. It is unforeseen consequences of sudden changes in the principles of Government that to my mind are most likely to break up the Empire.

**The True Policy.**—But I have come here to speak of what is clear

and not of what is controversial, and from the controversial I will sheer away. The policy which I suggest is, that we should perform no surgical operations with a view to merely beautifying the Imperial organism. Changes of form! Yes, they are necessary. But these changes of form come after, not before, changes of the substance that underlies the forms. That has been the distinguishing feature of British policy in Lesser Britain. I believe it to be the not less distinguishing feature of the policy of progress in the growth of Greater Britain. If it does not seem ambitious, if it has about it the appearance of what is humdrum and early Victorian, let us not forget that the nineteenth century was a period of colossal development and advance. If the pace of the past can be maintained; if we can continue to participate in an activity that, if unhasting, has been unresting, we shall have done the work of our generation. At the end we may find ourselves with new features in the Government of the Empire—the features of the strong man whose strength has grown silently and imperceptibly, but has none the less surely grown.

The policy of the statesman who acts on this view may seem unheroic and to savour of opportunism. But it is no more really unheroic or opportunist than the plan of one who would seek, by avoiding excess and strain, and following steady and unswerving purposes, to develop his life to the utmost of its possibilities.

# THE GREAT JURISTS OF THE WORLD.

## I.—PAPINIAN.

[*Contributed by* E. C. Clark, LL.D., *Regius Professor of Civil Law, Cambridge.*]

**Connection with Septimius Severus.**—The full name of this jurist appears in Justinian's Code, and in a quotation (from Paulus) in the same emperor's Digest, as Æmilius Papinianus. In the time to which he belonged no trustworthy inference as to ancestry can be drawn from these two words. There is sufficient evidence to show that he was a lifelong friend of the Emperor Septimius Severus, with whom, according to one story, he was connected by marriage, through Severus' second wife. An interesting connection, if true: for this was that famous Julia on whom Gibbon passes such a warm, and questionable, encomium at the beginning of his sixth chapter. For the scandalous part there seems to be little authority but a cock-and-bull story retailed by the omnivorous Dio; of her strange half-Jewish beauty and imperious ambition we have some record, in the likeness on the empress's coins and the newly assumed title "Domna"—best explained, it would seem, by the literal "Lady."

Papinian, therefore, may quite possibly have been a native of Syria—the empress was from Emesa—and come as a provincial to the study of Roman law. To this effect his omission of the regular style—*divus*—for deceased emperors has been remarked, in his earlier *Quæstiones*. It has been suggested that he may have been at one time a lecturer at Berytus; and on his whole career, Mommsen dubs him "in thought and speech the least Roman of the Roman jurists." Possibly we may credit his Syrian origin with the greater kindliness and the wider humanity which he certainly does seem to introduce into the strait-laced logic of his predecessors—such, for instance, as his "leader," the difficult Cervidius Scævola. Whether actually pupils of Scævola or not, Severus and Papinian are stated to have made their *début* as consulting counsel and teachers of law (*professio*) under the auspices of this jurist, who is a connecting link between those of the Antonine period and the last great group—Papinian, Ulpian, and Paulus.

The above statement (of Spartianus) is the earliest historical notice of Papinian, whom we may infer, if contemporary with his friend the future

emperor, to have been born about A.D. 146. For a late fabrication about his parentage see below (p. 22). He succeeded Severus, as we learn from the same authority, in the office of counsel to the Fiscus—sometimes, I think rather inaccurately, translated Privy Purse. It is not, however, my business here to investigate the constitutional position of the Fiscus and its gradual approximation to, or absorption of, the State Treasury. The specific office of *advocatus fisci*, which probably originated under Hadrian, must have had a large and increasing sphere of operation in the way of claims to *bona damnatorum*, *vacantia* and *caduca*.

We next find Papinian appearing—probably, as Karlowa suggests, by appointment of his friend Severus, who became emperor in A.D. 193—in the position of *magister libellorum* or *a libellis*. This office had no doubt very largely to do, as Mommsen shows, with petitions for admission to equestrian or senatorial rank, and the investigation of sufficiency of means in the applicant. One is tempted to translate its style "Master of Petitions," and to think of our own old Court of Requests. But it must be remembered that the word *libellus* was one of very wide signification, covering, it would seem, almost any application to the emperor either from private persons or magistrates.

**Drafting of the Imperial Rescripts: "Præfectus Prætorio."**—Dr. Roby, who uses the style "Master of Petitions," indicates, however, the probable influence of this officer upon what was practically legislation, in adding that the imperial rescripts were framed by him. The one which is actually stated to have been delivered "under Papinian's management of the *libelli*" (Digest, 20, 5, 12 *pr.*) is really an equitable decision, or rather rule, in contract law. And we should probably not be far out in attributing to the *magister libellorum* a considerable part of the functions of our early chancellors and keepers of the Privy Seal, with a practical power of direct legislation which those officers did not possess.

Finally—perhaps, to adopt another suggestion of Karlowa, upon the fall of Plautianus, A.D. 203—Papinian was raised to the position of *Præfectus Prætorio* (General of the Guard), which he retained till his death, or at least till the accession of Caracalla in 211. Whether his predecessor shared this office with colleagues or not, Papinian would seem to have held it alone. Its original military character, though still subsisting, had undoubtedly by this time become subordinate or overshadowed by a supreme civil and criminal jurisdiction, which its holder had acquired as the personal representative or delegate of the emperor.

With the criminal law of the Roman Empire I am not now so much concerned as with the civil law and its various methods of development. One of these is to be found in the *judicial decisions* of the emperor or his delegate, and the general rules often coupled with them. A good instance of this supreme jurisdiction—or practically of *legislation* (for the case seems to be a hypothetical one, of the John Doe and Richard Roe kind)—occurs in

the interpretation of a draft bond brought before Papinian in his Court as Præfect of the Prætorium (Digest, 12, 1, 40).

**The "Quæstiones" and "Responsa."**—But a more remarkable feature in the development of Roman civil law, and one with which Papinian was particularly connected, consists of the *opinions* given by *licensed* or *patented* jurists, whether in the consulting-chamber, the lecture-room, or the text-book. It is of this mode of development that I propose to speak more especially in what follows.

The works of Papinian coming under this head are mainly his *Quæstiones* and *Responsa*. The *Quæstiones* show in the first books some sign of that early, perhaps provincial, style above referred to, and may have been written before Severus' accession; but the greater part of the work—*e.g.*, Books 17–37—obviously belongs to the sole reign of that emperor, A.D. 193–8. The *Responsa* possibly begin under the joint reign of Severus and Caracalla (198–211), but from Book 4 onward they are later than A.D. 206, a constitution of which year is therein discussed (Digest, 24, 1, 32 *pr.*, 16); and the last five books (15–19) may have been written in the period between the death of Severus (February 4th, 211) and that of Papinian himself in the early part of the following year.

**Murder of Papinian by Caracalla.**—A certain amount of somewhat contradictory legend seems to have collected round the execution, or rather murder, of Papinian by Caracalla, but the main facts are fairly established. He accompanied Severus to Britain, where he evidently became aware of an attempt made by Caracalla to murder the emperor his father, though the language used by the latter does not, as I agree with Dr. Roby, amount to any imputation on the loyalty of Papinian himself. I need not give Dio's story (l. 76, c. 14), in which the aged Severus is made to play the part of the Admirable Crichton to his unworthy son, who does *not*, however, copy or anticipate the young Mantuan prince. It is perhaps worth remarking, by the way, that Zonaras, in *his* version of the story of Dio (l. 12, c. 10), written in the twelfth century A.D., gives the name of the Præfect as *Papianus*, thus furnishing a confirmation, which I do not remember to have seen noticed before, of the view now generally taken, upon the *style* of the Burgundian law-book, *Papiani Liber Responsorum* (see Savigny, *Gesch.*, ii. chap. vii.; Brunner, *Deutsche Rechtsgesch.*, i. 356–7, etc.).

Severus died and was buried, as Yorkshiremen hold, at York, in that mound which I have had pointed out to me, when a boy, under the odd title of *Saint* Sevĕrus' (*sic*) hill. Then broke out at once the hatred of the brothers, or perhaps half-brothers (Spartianus, Severus, 20, 21; Geta, 1)—at any rate the hatred of Caracalla for Geta—against which their father had uttered his last warning (Dio, l. 76, c. 21), and which had been suppressed or ignored under the wise management of the empress (see the interesting coins in Cohen's *Monnaies*, iv. 100). For the picturesque details of their return to Rome, I must refer again to the sixth chapter of Gibbon, who gives

them in full from Herodianus. The end of the story is the murder of Geta in his mother Julia's arms (Dio, l. 77, cc. 1, 2), shortly followed by that of Papinian, who had been dismissed at the beginning of the reign, and was despatched by the blow of an axe. According to one account, after a hypocritical show of friendship towards him by Caracalla (Spartianus, Caracalla, c. 3), Papinian's son, a Quæstor, was put to death at the same time, a fact which may possibly have contributed some part of Pancirolli's story, given below.

Whether the great jurist was killed as an adherent of Geta, or because he refused to defend the fratricide; whether he met his fate as one would expect, in silence, or, as Spartianus says, forecasting a similar end to his murderer; what truth or point there is in Caracalla's reported speech that the *sword*, not the *axe*, had been the proper instrument of execution—all this is matter of little concern to the present enquiry (Spartianus, Severus, c. 21; Caracalla, cc. 4, 8; Dio, l. 77, c. 4). It may, however, be worth note to remark that the famous constitution of Caracalla, by which all freeborn persons in the *orbis Romanus* were made Roman citizens (wrongly attributed in *Nov.* 78, 5, to Antoninus Pius), appears from Dio (l. 77, c. 9) to belong to this year, and not to be due to the foresight of any jurist or politician, but to the craft of a tyrant, wishful partly to palliate his evil deeds by an ostensibly popular measure, partly to increase his revenue by the subjection of a large number of people to taxation from which they were previously free.

Pancirolli (*De Claris Legum Interpretibus*, i. 55) gives a strange story of a silver urn found in the early part of the fifteenth century at Rome, purporting to contain the ashes of Papinian, and to have been dedicated to his memory by his father and mother, Papinianus Hostilius and Eugenia Gracilis—the old, contrary to the natural order, mourning for the young. Papinian is accordingly made to die at the age of thirty-six—an age absolutely irreconcilable with the facts of his life as preserved by contemporary, or almost contemporary, historians. The story, therefore, is not even *ben trovata*, and only shows the special interest felt at the Renaissance in this great jurist. A forged urn may quite possibly exist in some collection, but I have not had leisure to trace it. The names of the parents are most probably pure invention. For the possible suggestion of part of this story by the death of the *younger* Papinian, see above.

**Papinian's Pre-eminence as a Jurist.**—The encomiums passed on Papinian by historians of the time are very high, and not quite so vague as in other cases. He is the "*asylum* of right and treasury of legal learning" (Spartianus, Severus, c. 21); the one who "for knowledge and exposition of the laws surpassed all Roman legislators (*sic* νομοθέτας) before him or after him (Zosimus, 1, 9). The repeated recognitions of his superiority over his peers by Justinian are, no doubt, attributable partly to the pre-eminence accorded Papinian in the Law of Citations (see below): this latter is, however, in itself the strongest testimony. Modern writers on

jurisprudence and legal history echo his praises, from the early times of the Renaissance to the present day. But I only wish here to call attention to one particular characteristic of Papinian, which is especially remarked by some of the latest authorities (*e.g.*, Karlowa, *Rechtsgesch.*, i. 736; Krüger, *Sources*, French translation, 265; Sohm, English translation, 2nd ed. p. 103).

Papinian's special greatness, it is observed, lies in his application of theory. He teaches largely by concrete cases, but he ever strives to view the individual case with reference to its governing principle. His conclusions are, comparatively, very little encumbered with particular circumstances, but are stated, as far as possible, in an abstract and general form, etc., etc.

Now this characteristic, though pre-eminent in Papinian, is more or less shared by all the great jurists of the Digest. It has to do with a peculiar, and, to my mind, a very advantageous, mode of development in Roman civil law—a mode of development which, as it is distinctly connected with the authoritative *licensing* or *patenting* of certain jurists, is best considered by a brief view of that difficult and interesting subject. It is not impossible that a system to which the Roman law owed much of its merit might have some lesson for us even at the present day. And although many points in its earlier history are, and will probably continue to be, matter of dispute, that to which I particularly wish to draw attention is an ascertained fact, for at least as early as the time of Papinian.[1]

**The "Prudentes" and their Hypothetical Cases.**—The *prudens* of Roman law does not exactly correspond with any one of *our* recognised professional men. He was not a pleader, but rather combined the character of solicitor with that of equity draughtsman and conveyancing counsel, being consulted at his own house both by clients directly and by their *patroni*, or public pleaders. To these functions many, probably among the most active and able *prudentes*, added that of giving *public instruction* in law. They offered their services and leisure, to quote Pomponius' expression, as much to *learners* as to clients. Thus, although their *responsa* were no doubt originally delivered with regard to points actually in litigation, there naturally arose that framing or putting of *hypothetical* cases to which Sir Henry Maine justly attributed, as a consequence, a special development of *general rules or principles* (see the latter part of chap. ii. in *Ancient Law*).

This form of development may also be inferred on other grounds, partly philological, partly based on what we know of early practice, and partly on the sadly scanty accounts given by Pomponius and Gaius, writing under Hadrian or shortly after, of a very important accession of influence to some, at least, among the body of *prudentes*. During the republic the

[1] On the authorities for much of the following matter I must refer to Part II. chap. ix. of my own work, *Practical Jurisprudence*, from which most of this matter is taken, with such revision as has been suggested by later reading. Reference is also made from time to time to the sections of Pomponius's Enchiridium, Digest, 1, 2, 2, which is our main authority on the subject.

*prudentes* were simply teachers, text-book writers, or chamber counsel, without the necessity of any "call" or diploma. The profession was open to all who had confidence in their acquirements; they had no official position, and their opinions, in actual cases, were not binding on the judge, to whom they were communicated by the *prudens* or quoted by the litigant. These communications had the practical weight of their author's reputation—no more. Such, at least, was the state of things in the later republican Roman law. At an earlier time, it is held by some that the Pontiffs, or one of their number appointed for the year, *had* the power of delivering opinions which were binding on the *judex*. But this is extremely doubtful, and it is more in accordance, both with *à priori* probability and the general testimony of our only authority, Pomponius, to regard the measure of which I have next to speak as no revival of an old principle, but the introduction of a new one by Augustus.

**The Emperor Augustus and Licensed "Prudentes."**—It was by no means to the interest of that astute sovereign to leave entirely out of his own hands the influence exercised by leading *prudentes* upon the development of Roman civil law. Such influence was undoubtedly very great, operating through the current administration of justice, and its resultant rules of practice crystallised from time to time in the Prætor's edict; although, as has been said, the opinion of the *prudens* on an actual case was not binding on the *judex*. It was most probably with a view of exercising some control over this influence that Augustus, ostensibly "in order to enhance the influence of the unwritten law," directed "that *prudentes* should give *responsa* on his (the emperor's) authority or guarantee"—which naturally became a subject of petition, as matter of privilege (Pomponius, § 49). Much question has been raised as to whether the intention was henceforth to *prohibit* unofficial *responsa* (that is, in actual cases) or merely to give special weight—most probably a binding character on the *judex*—to official ones. The latter is my own view, which seems to me somewhat confirmed by the subsequently professed intention of the despot Caligula to prohibit *any one* from giving a *responsum* but himself (see below. I have adopted what I believe to be the better reading, in Suetonius, Cal. c. 34, "ne *qui* respondere possint præter eum").

After the institution of these licensed or patented jurists, their *responsa* were regularly delivered under their seal, not, of course, to conceal the opinion from their consulter—I avoid the word *client*, more properly expressing the relation to a *patronus*—but to accredit it as coming from the particular counsel. On the manner of quoting counsel's opinion which previously obtained there is some difficulty in the interpretation of Pomponius (§ 49). I still venture to hold, as against Dr. Roby (*Introduction to Digest*, 102), that the *ipsi* spoken of are the *consulters*, not the *prudentes*; but, whoever it was that originally communicated the opinion to the *judex*, it is clear that he received it from the patented counsel under the latter's official seal.

Whether, again, the celebrated Masurius Sabinus was the very first, or the first of equestrian rank, to receive the new distinction, and at what exact time he received it, are matters immaterial to the present subject. I retain my opinion, in spite of Mommsen's suggested emendation of Digest, 1, 2, 2, 48, that Sabinus was the actual first, and that the difficulties about his appointment by Tiberius may be solved by supposing the appointment to have taken place about A.D. 12–14 (see *Practical Jurisprudence*, p. 295).

For some time it would not appear that the privilege *respondendi ex auctoritate principis* was granted very widely. The threat of the Emperor Caligula seems to refer to a class, but the class is probably that of consulting counsel in general.

**The Authority of the "Responsa": Hadrian's Rescript.**—In the reign of Hadrian, however, the number of the licensed *prudentes* was most probably increased and the authority of their *responsa* more clearly defined. The former point seems to me fairly deducible from the somewhat obscure jocosity of the emperor's reply, to a request by men who had held the office of Prætor, that they might be allowed the right of response. This must clearly mean the licensed or patented position, whether that excluded the old practice or not. The reply, as reported by Pomponius (§ 49), was "that the position of adviser was not generally asked for, but volunteered, and that the emperor was only too well pleased if any one had sufficient confidence in his own powers to train himself to advise the public."

Whatever may be the precise meaning of this speech, a plurality of licensed counsel is clearly postulated in an actual rescript of Hadrian cited by Gaius (i. 7) as to the juridical effect of opinions delivered by jurists to whom the emperor has granted the *jus respondendi*. If they all agree, such common opinion is to have the force of statute; if they differ, the *judex* may follow which he pleases.

We have not, unfortunately, the *ipsissima verba* of this rescript, and it is quite allowable, on our information, to maintain that the powers which Hadrian originally intended to confer, or confirm, were simply judicative, or practically judicative, on actual cases for which the licensed jurists had been consulted.

**The Testimony of Gaius.**—On the other hand we have, in the first book of Gaius, written after the death (A.D. 138) of Hadrian (who is called *divus* in the passage referred to), and possibly, as some think, published after the death of Pius (A.D. 161), other testimony, of rather a significant character, as to the ultimate effect and the probable form of the *responsa* in question. Here we are told that they are among the permanent rules of law of the Roman people; they are the *sententiæ et opiniones* of men who had a definite permission *jura condere* (Gaius, 1. 2, 7). This curious phrase is often explained with reference simply to the time of Hadrian (of whose rescript it probably formed no part) or that of Gaius. As a matter of fact it descended from republican times. We find it, for instance, in Plautus' *Epidicus*

(3, 4, 89, 90), written shortly after 195 B.C. The second old man of the play—a wiseacre after the style of our own Polonius—has the name of being *omnium legum atque jurum fictor (et) conditor.*" *Condere "leges"* is of course predicated only in joke, of a private individual; *condere jura* was, as we shall see from another passage of Gaius (4, 30), a recognised function of the *prudens* in the system of the *legis actiones.* It is clear, not only from the natural meaning of the words, but from the manner in which they are used, by Plautus here and elsewhere, and by Gaius, that the phrase does *not* mean, as Austin and many later and better authorities take it to mean, *judicial decision*, but some work of non-judicial *prudentes.* It would also appear that *jura* must mean something more than an isolated *opinion* delivered on, and confined to, a particular case. I adhere, therefore, to my view, previously expressed in my *Practical Jurisprudence*, that the *prudens* spoken of as *jurum conditor* is so spoken of as *framing statements or maxims of non-statutory law*—law, that is, of custom or practice. The stage of legal proceedings at which these *jura* were employed, and their authority when so employed, varied for the time of the *legis actiones*, for that of the formulary system, and for that of the later empire, but their matter and form were probably determined by their earliest usage.

**The "Legis Actiones": Statement of General Principles.**—There are, as is well known, such deplorable *lacunæ* in our fragmentary information as to the *legis actiones*, that some stages of the procedure must be matter of inference, to be based, of course, on common sense and what seems obvious necessity. As one of these inferences, I myself hold, with a fair number of good authorities, that under the old system, except in the *legis actio per condictionem*, there *may* have been in all, and *must* have been in some cases, a brief statement as to the specific kind or ground of claim, made *before the magistrate* (*in jure*), partly to enable him to decide broadly whether this claim came within the law or not, partly to constitute some degree of definiteness in the reference to the *judex*, *arbiter*, or *centumviri.* These statements I take to be the *jura*, or rather the *raison d'être* of the *jura*, spoken of by Gaius in 4, 30, where he speaks of the *nimia subtilitas eorum qui tunc jura condiderunt.* They were brief allegations of legal principle, based, no doubt, as far as possible upon a statutory text, but also often, no doubt, including statements of law never embodied in statute, and sometimes inferences or generalisations entirely new. These were the subject-matter of *legis actiones* meaning what Muirhead terms "specific actions," as distinguished from *legis actiones* meaning generic modes of pleading—those specific *actiones* which Sex. Ælius, in his *Tripertita* (Pomponius, § 38), and other *conditores jurum* endeavoured, by more and more ingenious refinements, to adapt to new requirements less and less capable of being brought under the rigid old law.

How hazardous became these subtle statements of law, as the opening claim, made orally and irrevocably by the party or his *patronus*, before the

Magistrate; how they came to be superseded by special statements of the case (*verba concepta*), capable of amendment and mutual settlement *in jure* in the Magistrates' Court before they were sent down to the *judex*; how, in fine, the *legis actiones* were replaced by the formulary system, it is not my business here to tell. My object is simply to point out a natural meaning of *condere jura*, which is accountable for in the early system of procedure, and was presumably retained in the later. For there is no reason to believe that this "statement of general principles," which is properly indicated by the phrase, ceased to be employed by *prudentes* under the formulary system, whether in the building up of the reference to the *judex* or in the opinion read to him at the hearing; while it was equally or more applicable, as we see from the evidence of extant writings, to the practice of the legal teacher instructing his pupils.

**Dual Capacity of the "Prudens": Counsel and Teacher.**—In fact, when considering their answers or opinions, we must never lose sight of the double capacity filled by almost every *prudens* of eminence in the later republican and early imperial times. At first perhaps only a consulting counsel, he gradually became, almost more conspicuously, a teacher of law. His opinions were delivered, not only upon cases coming before the Courts, but upon questions raised in the Schools. And from this double position we find, as we might expect, in all his *dicta*, even where opinions are given on a case and in no way systematised into an educational work, a *generality* and an endeavour to lay down *principles* which is as far as possible removed from the guarded barrenness of some English judgments (of all good judgments as represented by Austin) or a modern counsel's opinion.

This characteristic has been specially remarked, as we saw above, in the instance of Papinian; but the same treatment, by other leading jurists, of cases whether actual or hypothetical, is very obvious in the numerous *Responsa*, *Opiniones*, *Disputationes*, *Quæstiones*, etc., of the Digest—where, of course, the fact that all were ultimately turned into so many *leges* by Justinian makes no difference in the original character of the extracts themselves.

**Form of "Responsa" as General Maxims: Their Growing Authority.**—With regard, then, to *form*, it is probable that the views even of contemporary jurists, consulted on an actual case *sub judice*, were stated rather in the shape of general maxims. With regard to ultimate *effect*, it seems likely that, even in Gaius's time, the conflict contemplated by him was possibly one between maxims delivered at different times and cited to the *judex* for some case to which they had no original reference. The *sententiæ et opiniones* had assumed, in practice if not by legislative sanction, a persistent authority, which in time communicated itself to other *sententiæ* and *opiniones*, never connected with actual cases at all. For, by the date of Constantine, it is certain that such authority was enjoyed, not only by *responsa* to consultations or enquiries, but by the works in general of some at least among the licensed

jurists, that order having ceased to exist for nigh upon a hundred years. Hence it is that we find, in Justinian's Digest, so large an amount of matter quoted from treatises—dogmatical, institutional, or exegetical—which are pure text-book law: general propositions not in the least resembling individual precedents, whether actual or hypothetical, nor like answers to particular questions. I need not do more than refer to the unreasonable manner in which these general propositions are questioned or condemned by Austin (Lect. 37; see *Practical Jurisprudence*, p. 299), who forces them into his hidebound conception of case law.

It is not my purpose, either, to enter here into the subject of *precedents* proper, in Roman law—into the influence, that is, which a particular *judgment* has, as in our law, upon similar subsequent cases. In spite of the oft-quoted passage in Cicero's *Topica* (5, 28), I venture to question whether *res judicata* had ever the exact meaning of an individual precedent. In the case of decisions, indeed, by the Emperor, or the person to whom his supreme jurisdiction was delegated, a special principle of precedents *was* recognised, but with considerable variation, during the legislative period from Hadrian—possibly from the beginning of the Empire—to Justinian. It was distinctly abandoned in a constitution of Arcadius and Honorius, A.D. 398 (Cod. Theod. 1, 2, 11), but finally recognised by Justinian in his Code (1, 14, 12 *pr.*) A.D. 529.

**Conflicts of Opinion, and the "Lex Citationum" of Theodosius.**—The remaining history of the *sententiæ et opiniones prudentium* is short and fairly clear: it contains, moreover, an interesting recognition of the superior merits of Papinian. The unanimity of opinions which had been required by Hadrian, for binding effect, naturally became more and more rare as the number of such opinions increased. Accordingly we find Constantine (in A.D. 321, 327) complaining of the never-ending *contentiones prudentium*—the authors mentioned being long dead—abrogating the notes of Paulus and Ulpian upon Papinian, but subsequently confirming all the writings of Paulus. These constitutions of Constantine were followed a hundred years later by the so-called *Lex Citationum* (a late designation) of Theodosius II. and Valentinian III. (A.D. 426). I give the main upshot of this enactment, avoiding its special difficulties. It confirms the entire writings of Papinian, Paulus, Ulpian, Modestinus, and Gaius, expressly giving the last-named author equal authority with the others. Validity is, at the same time, conferred upon the writings of a number of authors habitually quoted by all the above-named five—among whom, we may remark, is included Sabinus, the first licensed *prudens*. In case of a divergency or conflict, Papinian's view is to prevail over that of any *one*, but not *two* of the other writers; the comments upon him being again formally deprived of weight, though an absolute authority is given to the "Sentences" of Paulus. Where two jurists equal in the scale conflict, the judge is, of course, to choose.

This law is specially valuable as explaining difficulties which arise out of

the *list* of authors quoted in Justinian's Digest. The collection purports to be made from the books of those old *prudentes* to whom previous emperors had given authority for compiling and interpreting laws (*conscribendarum interpretandarumque legum*, Const. Deo Auctore, § 4).

Whatever *condere jura* originally meant, these words certainly indicate, for the subject-matter spoken of, generality of form and subsisting authority. The authors cited ought at first sight to be *confined* to the authorised or licensed *prudentes*. They are, in fact, quoted as early as Q. Mucius Scævola, who died 82 B.C., before Augustus was born. The presence, then, of this and other jurists who wrote before the licensing system is accounted for by their *quotation* in the writings of the five principal, or, as they are sometimes called, *academic* authorities specified in the Laws of Citations. The same statute, it was remarked, expressly includes Sabinus, whom we should have expected to appear in his own right. This gives a strong reason for thinking that the opinions, even of the licensed jurists, were not intended to have a binding force as precedents or general rules before the time of Hadrian's rescript, if then.

We may also infer from the language of the *Lex Citationum* that Papinian, Paulus, Ulpian, and Modestinus most probably did, and Gaius did not, belong to the privileged class.

**The "Digest" of Justinian.**—The objections are obvious to such a mechanical or arithmetical estimate of opinions as that above described. Justinian accordingly converted all the passages which he embodied in his Digest into some many *leges*, and placed them on an indiscriminate level (Const. Deo Auctore, § 6). As this was to be henceforth the sole book of reference, contradictions were of course not to be admitted, nor obsolete matter (*ibid.* §§ 8, 10)—a direction only imperfectly carried out. There are, it must be admitted, irreconcilable contradictions in the Digest, which can by no sophistry be explained away; which, on the other hand, give us, as marshalled by the date of their cited authors, many interesting examples of the gradual development which takes place in principles of practical law.

**The "Feast" of Papinian.**—One last word as to Papinian. In the old course of legal study which obtained down to the time of Justinian, who remodelled it in accordance with his own codification, the students were first introduced to the special reading of Papinian's *Responsa* in their third year, whence these third-year men were called *Papinianistæ*, and kept a feast or high day in honour of their author (Const. Omnem, § 4). Justinian, in order to retain in part the old study of this year, and to keep alive the respect due to that great name, contrived a somewhat artificial order and composition of the Books 20, 21, and 22, with which the *Umbilicus*, or central part, of his Digest begins. These books are accordingly called by certain anonymous annotators of the twelfth and fourteenth centuries (as being *instead* of Papinian) *Antipapian* or *Antipapin*. The former curious corruption of the name has been mentioned above (p. 21). It is just conceivable that the

further one, of *Papin*, may have given rise to an honoured name in French natural science. Of any *calembour* suggested by Denys Papin's best-known invention I am innocent.

**The Work of the "Prudentes": Its Juristic Value.**—The institution of licensed *prudentes* is often regarded as the mere establishment of a high court of civil justice, and their opinions as practically judgments on appeal or on reserved cases, which no doubt they often were. But, if I am right in the view here taken, the work of the *prudentes* from an earlier period than that of the imperial licence, and the work of the licensed *prudentes* afterwards, was something more. It habitually included—on principle, not as a mere *obiter dictum*—some amount of generalisation, much wider than Austin's *ratio decidendi*, and, moreover, directly expressed by its author—not requiring to be inferred or extracted by the laborious processes described in Austin's thirty-seventh and thirty-ninth lectures.

The advantage, or rather the necessity, for generalisation is only too apparent for ourselves, with our enormous and increasing mass of case law. This is no doubt done, and very ably done, to some extent in the headings of our yearly *Law Reports*, in reviews, and from time to time in text-books—the increasing consideration for the last being a noticeable feature in our Courts. Nor are our judges now, I think, so averse from laying down general rules or delivering themselves of general maxims as they used to be, and as they are, according to Austin, in duty bound to be. But the reduction of that most important branch of law which is continually growing out of the practice of the Courts, to an amount *cognoscible*, to use Austin's expression, even by the profession, becomes daily farther off than ever.

With all due appreciation of the gradual building up of our legal principles and the historic value of the process, one cannot but look with envy, in the interest of general utility, on Justinian's heroic remedy—to secure once for all, at whatever cost, an authoritative Digest of our present case law and make a clean sweep of the past cases. Of course case law must continue to go on, but it could be with ease subjected to a periodic authoritative revision and reduction to the form of general rules.

This, far more than the mere consolidation of Statutes, seems to me the one chance which has any hopefulness about it, of the much-talked-of Codification of English Law (see generally *Practical Jurisprudence*, Part II. chap. xvi.).

# RUSSIAN LEGISLATION AS TO CHEQUES.

[*Contributed by* JULIUS HIRSCHFELD, ESQ.]

AN Imperial Commission, appointed by the Russian Government, is engaged in drafting a new Civil Code for Russia. The Commissioners have published one part of their work containing the law of obligations resulting from contracts. This has been translated into German by Nicolaus von Seeler, advocate, and the translation published by the Stock Exchange Committee of Riga.

**The New Civil Code.**—The translator, in his preface, gives an extract from the memorandum which the Commissioners have issued with their work. According to this summary the subsisting laws were antiquated and therefore unjust, suffering from contradictions and gaps, want of system and an undisciplined terminology, which frequently resulted in the letter of the law being directly opposed to its spirit. The task, therefore, which the Commissioners had set themselves was twofold—viz., to bring the existing law into a clear form, and to supplement it wherever they met with any *lacunæ*. The sources from which they had drawn were the existing Civil Code, the judgments of the Supreme Court, the Swiss law, the German Civil Code, the Code Napoléon, and the law of the Baltic provinces.

**Engrafting Commercial Law.**—A point to which they draw special attention is the amalgamation of the commercial with the civil law, and its incorporation in this part of the Code. The reason was that, in the absence of a mercantile community (*Handelsstand*) in Russia, there has been no soil for the development of a specific commercial law.

One of the *nova* introduced by the present Draft Code is the law of cheques, which constitutes a chapter consisting of twelve clauses.

**Characteristics of the "Cheque."**—Before stating its principal provisions, I may be allowed to premise that Continental jurists note three characteristic points as determining and distinguishing the system of cheque law in the various countries, viz. :—

(1) Is a cheque a species of the genus bill of exchange, as in England and America,[1] or is it, as in Germany, France, Austria, Italy, an instrument of a type of its own?

[1] The Courts in America are at pains to point out the difference between cheques and bills of exchange (cf. *Byles on Bills*, 15th ed. p. 17).

(2) Must the drawee of a cheque necessarily be a banker, as in England and America, or can the order be addressed to any person, as in the Continental countries of Europe?

(3) Must the drawer, in order to be entitled to draw a cheque, have a deposit available for that purpose and at least equal to the amount drawn in the hands of the drawee? The English law does not require it. The doctrine of the American law inclines towards considering it requisite. The French Act of 1865 expressly prescribes a *dépôt*, whilst on the other hand the practice of the French Courts recognises credit cheques as well. In Germany (in the limited sphere in which cheques are in use) an available fund is required.

**Bankers as Drawees.**—Now passing on to the Russian Draft Code, Clause 577 provides: "By means of a cheque the drawer orders a bank or a banker to pay to holder[1] a sum certain out of the funds standing on current account at the disposal of the drawer." We see that the Russian codifiers, without giving a definition, propose to proceed on eclectic lines, adopting on the one hand the Anglo-American principle of making a banker drawee, assimilating on the other hand their system to those obtaining on the Continent by demanding a *dépôt*, and keeping a cheque distinct from a bill of exchange.[2]

The Draft Code provides, further, that a cheque shall remain valid for five days (cheques not payable at the place of drawing for ten days).

When a current account is opened, it can be stipulated that cheques exceeding a certain amount shall not be payable until the day after presentation.[3]

**Death of Drawer.**—The death of the drawer shall not invalidate a cheque.

**Damages.**—There are, moreover, provisions respecting damages in favour of drawer in case of delay in presentation, and in favour of payee in the event of non-payment of a cheque. Provisions as to crossing of cheques, or of a penal character in case of *mala fides* on the part of a drawer, are not contained in the Draft Code.

**German Cheque Law.**—In Germany a common law of cheques has not yet been passed. The nearest approach to satisfying what is a want felt there by a great number of financiers and economists was a Bill introduced by the Imperial Government in 1892. The Bill was abortive. Still, it may not be without interest to refer to a few of its provisions.

The Bill admits of any person—not only a banker—being made drawee of a cheque. The instrument must be described as a cheque, and must

[1] Order cheques are also provided for (Clause 579).

[2] The publication of a Bill relating to bills of exchange is in contemplation.

[3] The Bill does not state what, in such a case, the relation between drawer and payee will be.

refer to the credit account out of which it is to be paid. The time for presentation shall (regularly) be five days. A person giving a cheque, though he knew, or with reasonable diligence should have known, that at the time the requisite amount was not standing to his credit, shall be liable to a penalty not exceeding one thousand marks.[1] The same penalty shall be incurred by a person giving a cheque on which he has wilfully omitted to state, or mis-stated, the date of drawing.[2]

**Merits of Defining the Law.**—In conclusion, I venture to submit that the definiteness with which the Russian Draft Code, as well as the German Bill, differentiates a cheque will serve a useful purpose and be better calculated to assist, not only the theory, but also the practice, civil and criminal, of cheque law. The treatment of a cheque as a qualified bill of exchange seems to me a legislative mistake in so far as it is opposed to the true economical nature of the two kinds of instruments, one of which is pre-eminently intended as a medium of credit, the other as a medium of payment.

[1] The penalty shall not be inflicted if during the time allowed for presentation cover is provided.

[2] The latter provision purposes to guard against evading the provisions relating to the time for presentation.

# THE OWNERSHIP OF MERCHANT VESSELS.

[*Contributed by* EDWARD LOUIS DE HART, ESQ.]

**British Law: Policy of the Law.**—The policy of the law of this country as to the conditions under which ships could obtain registry under the British flag was directed, until the middle of the nineteenth century, to three objects:

(1) To ensure that British ships should be wholly owned by British subjects;

(2) To protect the native shipbuilding trade by excluding foreign-built ships, generally speaking, from the right of registry under the British flag;

(3) to encourage native seamen and ensure a supply of sailors for the Navy, by requiring that the master and at least a large proportion of the crew of a British ship should be British subjects.

The complete development of this policy is to be found in the Navigation and Registry Acts of 1845 (8 & 9 Vict., cc. 88, 89). Under these Acts no ship was entitled to any of the privileges of a British ship unless registered and navigated according to law. No ship could be registered unless (1) wholly owned by British subjects; (2) wholly built in the United Kingdom or one of the British possessions, or, if foreign-built, condemned in a Court of Admiralty as prize of war or forfeited for a breach of the laws for the prevention of the slave trade. Further, no ship could continue to enjoy the privileges of a British ship if repaired in a foreign country at an expense exceeding twenty shillings per ton, except in case of necessity caused by extraordinary damage. No British ship which had become prize to an enemy or had been sold to foreigners could, as a rule, again obtain the privileges of a British ship. The Navigation Act declared that every British registered ship should be navigated by a British master, and a crew of which at least three-fourths were British seamen or which, in the case of coasting vessels, consisted wholly of British seamen. The Navigation Act of 1849 (12 & 13 Vict., c. 29), however, abolished the disqualifications imposed on foreign-built ships, captured ships, or ships repaired abroad.

**The Merchant Shipping Act, 1894.**—The qualification for owning British ships, or shares in British ships, is now defined in the Merchant Shipping

Act, 1894, re-enacting in substance s. 18 of the Merchant Shipping Act, 1854. S. 1 of the Act of 1894 provides that a ship shall not be deemed to be a British ship unless owned wholly by persons qualified to be owners of British ships. The persons so qualified must be

(*a*) Natural-born British subjects;
(*b*) Naturalised British subjects;
(*c*) Denizens;
(*d*) "Bodies corporate established under, and subject to, the laws of some part of the British dominions, and having their principal place of business in those dominions."

The same section further provides that a natural-born British subject who has become a subject or citizen of a foreign State shall not be qualified to be the owner of a British ship, unless he has subsequently taken the oath of allegiance to the King and is, during the time he is owner of the ship, either resident in the British dominions or a partner in a firm actually carrying on business in the British dominions. Similarly a naturalised British subject or a denizen is not qualified to be the owner of a British ship, unless he has taken the oath of allegiance and is either resident in the British dominions or a partner in a firm carrying on business in the British dominions.

**Registration.**—With the exception of certain small ships employed in the coasting or North American fishing trade, or in inland navigation, all British ships must be registered under the Act (ss. 2, 3). To ensure that no ships in which an alien in interested shall obtain the protection of the British flag, the Act provides that no person is entitled to be registered as owner of a British ship, or of a share in one, until he has made a declaration stating (*inter alia*) his qualification to own a British ship. In the case of a corporation a similar declaration must be made by an authorised agent, and it must state such circumstances of the constitution and business of the corporation as prove it to be qualified to own a British ship. The owner, or the agent of the corporation, must also declare that to the best of his knowledge and belief no unqualified person or body of persons is entitled as owner to any legal or beneficial interest in the ship or any share therein (s. 9).

Moreover, "if a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear to be a British ship," the ship is subject to forfeiture, unless the assumption has been made to escape capture by an enemy or by a foreign ship of war in the exercise of some belligerent right (s. 69 [1]).[1] Further, if an unqualified person acquires as owner, otherwise than by such trans-

[1] The German and Japanese Laws of 1899 have a similar provision; but the German Law, unlike the British and Japanese, makes no express exception in the case of ships seeking to avoid capture.

mission as is provided for in the Act (*e.g.*, on the death or bankruptcy of the owner), "any interest, either legal or beneficial, in a ship using a British flag, and assuming the British character," his interest is subject to forfeiture[1] (s. 71). Nor is an unqualified person who has acquired a British ship or a share therein in such a manner that it is not liable to forfeiture allowed to retain the property. He must within a limited time apply to the proper Court for an order for its sale, otherwise it is liable to forfeiture (ss. 27, 28).

**Officers and Crew need not be British.**—Unlike the law of some foreign countries, the British law has not since 1854 required that either the master or the officers or any portion of the crew of a British ship shall be British subjects.[2] Under s. 94 of the Merchant Shipping Act, 1894, the Board of Trade may make rules for the qualification of applicants for a master's or mate's certificate, and the Board's existing regulations enable a foreigner, provided that he can speak and write English, to obtain a certificate on the same terms as a British subject.

**Ownership by Corporations.**—The question whether an alien can be a member of a British corporation which owns ships was raised nearly sixty years ago in *Regina* v. *Arnaud* (9 Q.B. 806; 16 L.J. Q.B. 50), the proceedings taking the shape of a *mandamus* to compel the custom-house officers to register a vessel, the property of a company incorporated by charter in which some of the shares were owned by foreigners. The Court of Queen's Bench held that the individual members of the corporation were in no legal sense the owners of the vessel. The legal owner of the ship, they said, was the corporation, and they could not notice any disqualification of an individual member which might disable him, if owner, from registering a vesssel in his own name. The Statute on which the question arose was 8 & 9 Vict., c. 89, which required that ships, in order to obtain a British register, should belong wholly to British subjects. This is the only decision as to the right of aliens to hold shares in British shipowning companies.

It may, perhaps, be argued that 8 & 9 Vict., c. 89, only prohibited an alien from being the legal owner of shares in a British vessel, and, therefore, that *Regina* v. *Arnaud* does not prove that the shareholders in a shipowning company are not the owners of a beneficial interest in its ships, within the meaning of the later Merchant Shipping Acts. In a popular sense, a shareholder may be said to be interested in the property of the company. There is, however, an overwhelming amount of authority to show that in no legal

[1] Instead of "shall be subjected to forfeiture," the corresponding s. 103 of the Merchant Shipping Act, 1854, contained the words "shall be forfeited," and it is doubtful whether the decision in *The Annandale* (2 P.D. 179, 218) on the words in the earlier Act is applicable to those in the later one.

[2] The latest Navigation Act which required that the master and a portion of the crew should be British subjects was 12 & 13 Vict., c. 29, which was repealed by 17 & 18 Vict., c. 120.

sense of the term has a shareholder any "interest" whatever in such property. His rights are simply the right to participate in the profits of the company when divided amongst its members, the right to attend and vote at the general meetings, and the right to a share of the surplus assets in the event of the company being wound up.[1] Even when one shareholder practically owns all the shares in a company, it cannot now be maintained that the company is a trustee for him.[2] Therefore, unless the term "owner of a beneficial interest" can be shown to have a peculiar meaning in the Merchant Shipping Act, it follows that an alien is not disqualified from being a member of a corporation which owns British ships. There is nothing in the definition of a "beneficial interest" in s. 57, or in any of the provisions of the Act, which suggests such a disqualification.[3]

Unless this view of the law is erroneous, the result is a curious anomaly. The policy of the law, ever since the registry of ships was instituted, has been to restrict the right to own ships sailing under the British flag to British subjects. Yet a number of aliens can, by availing themselves of the provisions of the Companies Acts, gain this right which is withheld from them as individuals. This anomaly, however, does not exist only in English law. The theory that a company is an entity whose character does not depend on that of its individual members seems to have been pushed to the same extreme logical conclusion in the jurisprudence of other countries; and in nearly every State a company incorporated under its laws and carrying on business in its territory is in the same position as a subject or citizen. In Sweden, however, the law, to entitle a ship owned by a company to be Swedish, requires all the shareholders to be Swedish subjects.[4]

There is no express provision as to the validity of mortgages of British ships to foreigners. A mortgage is clearly a "beneficial interest" in a ship within the definition of that term in s. 57 of the Merchant Shipping Act, 1894 (see also s. 58). Is the mortgagee, then, the owner of a beneficial interest in the ship? The answer would no doubt be "Yes" but for the provision of s. 34 that, except as far as may be necessary for making a

[1] See *Myers* v. *Perigal*, 2 De G. M. & G. 599; per Willes J. in *Wilson* v. *Jones*, L.R. 2 Ex. at p. 144, and in *Bank of Hindustan* v. *Allison*, L.R. 6 C.P. at p. 73; per James L. J. in *Morrice* v. *Aylmer*, L.R. 10 Ch. at p. 155; *Ashworth* v. *Munn*, 15 Ch.D. at pp. 363, 368, 375; per Cotton L.J. in *Nanney* v. *Morgan*, 37 Ch.D. at p. 352; *Harburg Indiarubber Comb Company* v. *Martin* [1902], 1 K.B. 788. In *Driefontein Consolidated Gold Mines, Limited*, v. *Janson* [1901], 2 K.B. at p. 427, the late Master of the Rolls apparently said that the beneficial ownership in the gold obtained from the plaintiff company's mines was in the shareholders, though his judgment is not based on this statement.

[2] *Salomon* v. *Salomon & Co.* [1897], A.C. 22.

[3] If a shareholder in a limited liability company were "beneficially interested" in its ships within the meaning of the Act, it would follow from s. 58 that he is directly subject to all pecuniary penalties imposed by any Act on the owners of ships or shares in ships.

[4] See *post*. Such a provision would, in this country, affect the right of British railway companies to own sea-going ships, as some shares in all of them no doubt belong to foreigners.

mortgaged ship or share available as security for the mortgage debt, the mortgagee shall not be deemed to be the owner of the ship or share. The effect of this provision is probably that as long as the mortgagor retains possession of the ship, the mortgagee is not deemed to be the owner of a beneficial interest, but that if the mortgagee takes possession and himself sails the ship, he becomes in law the owner of such an interest. Thus it seems that a foreigner can be a mortgagee of a British ship, but that if he takes possession he has no right to sail her under the British flag.

**Law of the United States.**—The law of the United States on the subject under discussion was, as might be expected, modelled on the provisions of our Navigation Acts. The first Statute which dealt with the registration of ships under the flag of the United States was an Act of 1789. That Act was repealed by one of 1792, which has been embodied in the Revised Statutes of the United States passed by Congress in the session of 1873–4 (Rev. Stat. Title xlviii.). Under the Act of 1792, only ships registered pursuant to law, or qualified to carry on the coasting or fishing trade, are deemed to be vessels of the United States; and in order to be entitled to registration or to enrolment as a vessel engaged in the fishing or coasting trade, a ship must belong wholly to citizens of the United States[1] and must have been either (1) built within the United States,[2] or (2) captured in war by citizens of the United States, or (3) adjudged to be forfeited for a breach of the law of the United States (Rev. Stat. ss. 4131, 4132, 4312).

It is further provided by the Act of 1792, as amended by Acts of 1884 (c. 121) and 1896 (c. 225), that no ship can enjoy the privileges of a United States vessel longer than it continues to be wholly owned by citizens of the United States or by a corporation created under the laws of any of the States, and to be commanded by a citizen of the United States. Further, all the officers of United States vessels who have charge of a watch must be citizens. Such officers include pilots, and, as regards steamers, the chief engineer and each assistant engineer who has charge of a watch. In cases, however, where on a foreign voyage a ship has been deprived of the services of an officer other than the master, an alien may fill his place until the return of the ship to her home port.

The law used until recently to restrict the right of non-resident citizens to own ships. A vessel lost the benefits of registry if owned in whole or in part by a natural-born citizen who usually resided in a foreign country,

[1] The owner, to obtain registry, must declare on oath that no foreigner is "directly or indirectly, by way of trust, confidence, or otherwise" interested in the vessel, or the profits or issues thereof.

[2] Under an Act of 1852, however, the Secretary of the Treasury may issue a register for a foreign-built ship wrecked in the United States, and purchased and repaired by a citizen, provided that the repairs are equal to three-fourths of the cost of the vessel when repaired (Rev. Stat. s. 4136). Sometimes a special Act is passed to allow the registration of a particular foreign-built ship.

unless he was a consul of the United States, or an agent for, or a partner in, a house of trade consisting of citizens actually carrying on business in the United States. In the case of a naturalised citizen, the same results followed if he resided for more than a year in his country of origin, or for more than two years in any other foreign country, unless he was a consul or other public agent of the United States. Both these provisions were repealed by a Law of 1897 (c. 389, s. 16).

The Act of 1896, c. 255, expressly recognises the right of corporations created under the laws of any of the States to own ships. The registration of ships owned by corporations is regulated by an Act of 1825. The register of a vessel owned by an incorporated company is made out in the name of the president or secretary, and must be renewed on his ceasing to hold the office. The register, it is expressly declared, is not affected by sales of shares or stock in the company. Before the register is granted, the president or secretary must swear to the ownership of the vessel by the company, without specifying the names of the members; and his oath is sufficient without requiring the oath of any other person interested or concerned in the vessel.[1]

**Law of the German Empire.**—The German law respecting the qualification to own German ships was until quite recently contained in a Law of the North German Confederation of the 25th October, 1867, which in 1871 became the law of the German Empire. It was amended by a Law of the 23rd December, 1888, with the object of making the clause dealing with its application to corporations more precise, and has now been practically re-enacted, with some slight modifications, by a Law of the 22nd June, 1899. Art. 2 of the Law of 1899 declares that only those merchant ships are entitled to carry the German flag which are the exclusive property of German subjects. Then follows a provision with reference to the application of this article to partnerships and companies, for the right understanding of which a short explanation of the German law on the subject of trading associations (which in many respects is similar to that of other Continental States) is necessary.

A partnership (*offene Handelsgesellschaft*) consists, as in this country, of members jointly and severally liable for the whole of the partnership debts (Commercial Code, Arts. 105, 124, 128). It must be registered, and all the partners must join in a declaration before the Court within whose jurisdiction its place of business is, stating (1) their full names, professions, and places of abode; (2) the firm-name of the partnership and the place where it carries on business; (3) the date when the partnership was formed (*ibid.*, Arts. 106, 123). A *Kommanditgesellschaft* (in French, *Société en commandite*—a term for which there is no English equivalent, but which it will be convenient to call a *commandite* company) is an association or

[1] Rev. Stat. ss. 4137-9.

partnership carrying on business under a trade-name, consisting of two classes of members:—

(1) Sleeping partners or members whose liability is limited to the amount of the capital subscribed by them (in French, *commanditaires*), who are not allowed to take any active part in the management of the association.

(2) Personally liable members—*persönlich haftende Gesellschafter* (in French, *commandités*)—who alone have the right to carry on the business of the association, and whose liability is unlimited (*ibid.*, Arts. 161 *et seq.*).

The declaration made for the purpose of registration (Art. 106 *sup.*) must state the names of the sleeping partners and the amount of capital subscribed by them, as well as the names of the active members; but the names of the sleeping partners and the amount invested by them are not published.

There are two kinds of trading companies, whose capital is divided into shares. The *Aktiengesellschaft* (literally, "company in shares") is a limited liability company (Commercial Code, Art. 178). The *Kommanditgesellschaft auf Aktien* (in French, *société en commandite par action*) consists, like the ordinary *Kommanditgesellschaft*, of two classes of members—those who assume unlimited liability to the creditors of the company, and those whose liability is limited to the amount of their shares (*ibid.*, Art. 320). Both kinds of companies must be registered in the trade register of the district in which they have their place of business (*ibid.*, Arts. 195, 320, 323).

Art. 2. of the Law of 1899, after declaring that German ships must be wholly owned by German subjects, deals, as has been said, with the question of ships owned by partnerships and corporations. Ordinary partnerships (*offene Gesellschaften*) and *commandite* companies (*Kommanditgesellschaften*) are deemed to be German subjects, when the personally responsible members are all subjects. Other trading associations, registered associations (*eingetragene Genossenschaften*), and legal persons in general must, in order to be deemed German subjects, have their place of business in the German Empire. This is, therefore, all that is required in the case of a limited liability company (*Aktiengesellschaft*); but in the case of a *commandite* company in shares (*Kommanditgesellschaft auf Aktien*) there is an additional proviso that all the personally liable members shall be German subjects.

Art. 7. requires that the entry of the ship in the register of ships shall, among other particulars, specify the names of the owners. In the case of partnerships, the name and description of each member must be entered. In that of a *commandite* company, whether divided into shares or not, only the names of the personally liable partners or members need be specified. When a limited liability company is an owner or part-owner, the names of the members need not be entered.

By Art. 3, if the part-proprietor of a German ship loses his German nationality, or if a share in a ship becomes vested in a foreigner otherwise than by a sale, the ship retains the right to use the German flag for a year; and within six months a sale of the unqualified owner's interest may be ordered on the application of a majority of the co-owners.

Art. 503 of the Commercial Code forbids the alienation by a part-owner of his interest in the ship without the consent of his co-owners, when this involves the loss of the right to carry the German flag.

**Law of France.**—The existing law of France as to the conditions under which a ship is entitled to be registered as a French ship is contained partly in the Law of the 21st September, 1792, partly in the Law of the 9th June, 1845. The Law of 1792, which was evidently based on the English Navigation Laws, required (1) that the ship should be wholly owned by French citizens; and (2) that the captain, the officers, and at least three-fourths of the crew should be French. The former provision has been relaxed by the Law of 1845, which only requires that the ship shall be owned as to a moiety by Frenchmen; the latter provision still remains in force.[1] The Law of 1792 also required the ship to have been built in France; but this provision was repealed in 1866.

A French ship loses its nationality when refitted or repaired abroad at a cost exceeding six francs per ton, unless the necessity for the excess of expenditure has been certified by a French consul or by two merchants of French nationality (Law of the 27th Vendémiaire, Year VIII.).[2]

The French law does not deal expressly with the question of the ownership of vessels by companies. The subject has attracted some attention, and is discussed by MM. Lyon Caen and Renault in their elaborate treatise on French commercial law. Their view is that a French company is entitled to own a French ship, whatever proportion of its shares be held by foreigners, on the ground that the national character of a company depends solely on its domicil and is not affected by the nationality of its shareholders. This right, in their opinion, even belongs to a *société en nom collectif* (which is practically the same as a partnership in this country), when it carries on its business in France, though all the members of the firm be foreigners.[3]

The question of the registration of ships belonging to limited companies (*sociétés anonymes*) was in 1887 referred by the Minister of Finance to the Conseil d'Etat, whose opinion was delivered on the 5th April (see, for the text, *Revue de Droit Maritime*, iii. 247). In their opinion it was

[1] A few exceptions have been made to this Law for climatic considerations—*e.g.*, in the case of the engine-room staffs of mail-boats trading to the Red Sea and the Indian Ocean.

[2] Cf. 8 & 9 Vict., c. 89, s. 7.

[3] See Lyon Caen and Renault, *Traité de Droit Commercial*, vol. ii. ss. 1162–9; vol. v. s. 57.

impossible to attribute to a limited company the character of a French citizen ("il est impossible de reconnaître à une société anonyme la qualité de citoyen français"). Until the matter was dealt with by the Legislature, they considered that the authorities must act on their own responsibility as regards registration, and that they were entitled to refuse it to companies whose composition did not appear to them to satisfy the policy of the law ("sociétés dont la constitution ne lui paraitrait pas répondre aux vœux du législateur sur la matière"). They added that it is impossible to state precisely in what cases the authorities should consider that the French interests which it is the object of the law to safeguard have been protected ("il n'est pas possible de formuler, dans un text précis, les conditions auxquelles l'administration pourrait reconnaître qu'il est donné satisfaction aux intérêts nationaux que ladite législation a pour but de sauvegarder").

A Law of the 10th July, 1885, declares that the sale to foreigners of a French ship on which there is a mortgage is invalid.

**Law of Italy.**—Art. 39 of the Mercantile Marine Code declares that no vessel is to be deemed Italian or entitled to use the Italian flag unless furnished with a certificate of registry (*atto di nazionalità*). To obtain a certificate of registry, a ship must belong as to two-thirds to Italian citizens, or to foreigners who have been domiciled or resident [1] in Italy for at least five years (Art. 40).

A partnership (*società in nome collettivo*) or a *commandite* company (*società in accomandita*),[2] even when its offices are situated abroad, is deemed to be Italian if any one of the class of members who are jointly and severally liable (*socio solidale*) is an Italian citizen (Art. 40). A partnership or company of either of these kinds which is composed of foreigners, but is established or has its principal office (*sede*) in Italy, is on the same footing as a foreigner domiciled in the kingdom. A limited liability company (*società anonima*) is considered to be Italian if its principal office is in Italy and its general meetings are held there (*ibid.*). The branch establishments of foreign companies which are authorised by the Government to carry on business in Italy are on the same footing as strangers domiciled or residing there, provided that they have a representative there furnished with full powers to represent them (*mandate generalo*) (*ibid.*).

When foreigners who have not been domiciled or resident in Italy for five years have by any means acquired the ownership of more than one-third in an Italian ship, they must within a year transfer the excess to some qualified person. Failing such transfer, the captain of the port of the ship's registry will sell the excess by public auction. Similarly, an Italian who loses his nationality, as by naturalisation elsewhere, or an Italian woman

[1] A person's civil domicil is where he has the principal seat (*sede*) of his affairs and interests; his residence is where he habitually lives (Civil Code, Art. 16).

[2] See *ante*, German Law: *Kommanditgesellschaft.*

who by marrying a foreigner acquires his nationality, must within a year dispose of his or her interest in an Italian ship in excess of the third which foreigners are entitled to own (Art. 41).

Art. 71 of the Code requires that in fitting out an Italian ship the master and at least two-thirds of the crew must be Italians. In foreign ports, however, consular authorities may, in case of necessity, permit foreign seamen to be shipped in excess of the allowed proportion. Then follows a declaration that it is not permissible to let foreigners fill the office of master or mate, unless this has become necessary from the impossibility of procuring Italians. Failing qualified foreigners, or when the consul does not think it advisable to employ them, an Italian of inferior grade may be put in command of a ship.

It is worth noticing that, except in the case of a judicial sale, the sale of an Italian ship to an unqualified foreigner is null and void, unless the permission of the maritime authority if the ship is in the realm, or that of the consular authority if she is abroad, has been obtained. This permission will not be given if there be registered mortgages or bottomry bonds on the ship, or if the sale be opposed by privileged creditors (Mercantile Marine Code, Art. 48). Privileged claims are claims which take priority over other debts and even over mortgages. They include claims for certain law costs, for wages, for debts due to the State, etc. (see Civil Code, Arts. 1950–60).

**Law of Holland.**—The ownership of Dutch ships is regulated by a Law of the 28th May, 1869. A remarkable feature of the Dutch law is that domicil in the country, instead of nationality, is the qualification for owning Dutch ships. A ship may be registered under the Dutch flag when it belongs as to more than one-half to (1) persons domiciled in Holland; (2) partnerships or *commandite* companies established in Holland, provided that at least one half of the partners or personally responsible members are domiciled in Holland; (3) limited liability companies or corporations established in Holland in conformity with Dutch law, provided that at least one-half of the directors are domiciled in Holland.

For the purposes of this Law persons domiciled in Holland include (1) Dutchmen residing in Holland; (2) all other persons who have resided there for a year when registration is applied for. The certificate of registry becomes void when the ownership of the ship becomes entirely vested in foreigners. In other cases, when unqualified persons become interested while the ship is abroad, the certificate does not become void until the ship returns to Holland.

**Law of Sweden.**—By the Maritime Code of 1891, a Swedish ship must as to two-thirds be owned by Swedish subjects, or by a partnership of Swedes and Norwegians, or by a company divided into shares having its principal place of business in the kingdom and consisting of Swedish subjects. The manager must always be a Swede and be domiciled in Sweden (Art. 1).

A sale of a share in a Swedish ship to a foreigner without the consent of

all the co-owners is null and void, when by reason of such sale the ship forfeits its national character. When by succession a foreigner has become the owner of such an interest in a Swedish ship as entails the loss of Swedish nationality by the ship, or when the same result would be caused by the naturalisation of a part-owner in a foreign State, he must sell such a part of his interest as will enable the ship to remain under the Swedish flag; otherwise his co-owners may compel a sale thereof (Art. 5).

The master, mate, and three-fourths of the crew must be Swedes or Norwegians; but in foreign parts alien sailors in excess of one-fourth may be shipped (Royal Ordinance of the 31st December 1891).

**Law of Norway.**—Art. 1 of the Maritime Law of the 20th July, 1893, requires a Norwegian ship to be owned exclusively by Norwegians or, provided that the managing owner is a Norwegian domiciled in Norway, by Swedes and Norwegians. When a ship is owned by a limited liability company (*Aktieselskab*), the chief place of business must be in Norway, and all the directors must be shareholders and Norwegians. As in Sweden, a share in a ship may not be sold to a foreigner without the consent of the co-owners when it entails the loss of nationality, and a foreigner must sell an interest in a Norwegian ship which he has acquired by succession (Art. 20).

# NAVAL OR VICTUALLING STORES: THE RIGHT OF PRE-EMPTION

[*Contributed by* R. G. Marsden, Esq.]

**Naval Prize Bill, 1902, s. 34: Its History.**—S. 34 of the Naval Prize (Consolidation and Amendment) Bill now before Parliament has a history which takes us back directly to the war of 1744, and possibly much earlier—to the Scottish war of Henry VIII. It purports to enable the Admiralty to purchase "naval or victualling stores" on board a foreign ship "taken or brought into a port of the United Kingdom," and to enable the Commissioners of Customs to "permit the stores purchased to be entered and landed within any port." If this clause passes into law, it is probable that during the next naval war its purport and effect will become the subject of discussion in the Courts and Chanceries, not only of this, but of other countries, both neutral and belligerent. The action of the English Government in this matter—namely, preventing the supply of victuals to the enemy in time of war—has varied considerably during the past three centuries; and the records of our Admiralty Court, the most authentic source of information upon this subject, throw upon it some light which does not seem to have been hitherto noted.

**Scottish War in time of Henry VIII.: Pre-emption of Contraband.**—The right of pre-emption was asserted by a proclamation of Henry VIII. declaring that he would seize ships "laden with victualls or artillary or any other thing comyng out of France to Scotland to the intente to ayde or succour the same realme of Scotland . . . gyffyng the merchaunts thereof the hole sumes that so shulde arise or growe of the same goods so taken." This lenient treatment of neutrals, who supply the enemy with munitions of war, has never since been adopted; but the seizure and compulsory purchase of victuals destined for the enemy's country generally is more severe on neutrals than is usual in modern times.

**Spanish War in time of Elizabeth.**—About forty years after Henry VIII.'s Scottish war, the United Provinces, having revolted from Spain, and being at the time assisted by Elizabeth, in 1584 issued a proclamation prohibiting the supply of war material or victuals to ports of the Spanish Netherlands. This received the assent of Elizabeth and her emissary, the Earl of Leicester, and it was enforced by the Admiralty Court of England. A

few years afterwards, in 1587, when open war between England and Spain was imminent, a fleet of Easterling ships bound to Spain was stayed by Elizabeth at Falmouth, and searched for "Spanish preparations, munitions, or victuals." In 1589, the year after war had broken out, Elizabeth warned the Hanse towns, from which Philip had drawn most of his naval supplies for the Armada of the previous year, that she would seize and condemn as prize ships carrying war or shipping materials or victuals to Spain. In 1591 she fulfilled her threat; four Hamburg ships were captured by the Earl of Cumberland, and their cargoes of corn, canvas, and other naval stores were condemned. Ships and cargoes belonging to the Mediterranean States and other neutral Powers were treated in the same way. Munitions of war and shipping materials were invariably confiscated; but in the case of provisions a concession was made to neutral shipowners in restoring to them their ships and paying them freight. As regards the Hollanders a curious state of things prevailed. They were at war with Spain and were allies of England; but this did not prevent their carrying on a lucrative trade with Spain, in the course of which they supplied Philip with war material, ships, and victuals. Elizabeth was furious at what she held to be the treason of her allies; their ships were captured and the cargoes of corn, munitions of war, and shipping material condemned. In vain the Hollanders protested that they could not live without their carrying trade, and that if Elizabeth seized their ships they must leave her protection and submit to Spain. Restitution of their ships and payment of freight of corn cargoes did not satisfy them. That this was a concession to neutrals and more than their due, in the opinion of Dr. Cæsar, the judge of the Admiralty, is evident from a letter which he wrote to the Council, by whose direction he was compelled unwillingly to pass sentences of restitution of ships and freight. By the law of nations, as he understood it, the captors were entitled to condemnation of both ship and cargo as prize. In the letter above referred to, after protesting that "the due consideration of this point of policie is farre above the rech of his poor capacitie," he writes that if the Queen would only order "that no man should meddle in Admiralty causes, but only the said admiral and his judge, and that only by ordinary course of justice, which is by the civill and maritime law, the truest and most indifferent judge between all nations, then justice would be equally administered both to strangers and subjects; the Flemings should have no juste cause for further complaints, and the poor Englishmen should find sufficient cause of sound and full contentment; and, above all, her Majesty shall reape the greatest benefit, whose Highness shall enjoy contented neighbours, rich subjects, and full coffers, things most acceptable in these times."

Whether Dr. Cæsar was right in his view that by the law of nations, as then understood, ships carrying war material and victuals to the enemy were, together with their cargoes, good prize, is not quite clear. Probably he was

right, but Elizabeth and her Council were not prepared to go that length. The Admiralty Court of that day was scarcely an independent tribunal. Its judge had to take much of his law from the Council, and the orders of the Council as to what ships and goods should be condemned had to obeyed by him. By orders of the Council issued in 1591 and 1592 innocent goods and neutral ships were directed to be restored and freight to be paid on corn cargoes; and, except in special cases, as where the neutral ship resisted search, Dutch, Hamburg, and Venetian ships were invariably restored, with freight.

In 1599 a Hamburg ship was brought in with corn on board for Spain. For some reason which does not appear, the owners of the corn received more favourable treatment. The Queen was advised to buy it, and it was discharged for her use. A difficulty arose in consequence of the previous order of the Council as to payment of freight. The commissioners appointed to discharge the corn asked who was to pay the freight. They were told that they were raising needless difficulties; as to the freight, "you might easilie conceive that there is none payable by her Majestie"—for she might, if she pleased, confiscate the corn; and if, out of grace, she paid for it, the ship-owner must look for his freight to the "receivers of it"—meaning apparently the receivers of the purchase money. This appears to be the only case in which pre-emption was exercised until the eighteenth century. No similar case has been found amongst the records of the Admiralty Court, either during the Scotch war of Henry VIII. or subsequently; but it is possible that some cargoes were paid for during the war of Queen Anne's reign, under the Order in Council mentioned below.

**Spanish War in time of Charles I.**—By the treaty of Southampton, concluded in 1625 between England and Holland, munitions of war and victuals (*munitions de bouche et de guerre*) were declared contraband, and ships carrying them to be prizable. By a proclamation of the following year this was explained to mean that corn, grain, victuals of all sorts, together with a number of articles enumerated as munitions of war, if destined for a Spanish port, were contraband, "according to Acts of State in the time of Queen Elizabeth."

**Dutch Wars of Charles II.**—Instructions issued to privateers in the Dutch wars of 1665 and 1672 declared ships carrying victuals to Holland, together with their cargoes, to be good prize. Seizure and condemnation of French ships immediately raised a difficulty with France. The French Ambassador objected strongly to the seizure of victuals as contraband, as well as to the condemnation of French ships carrying Holland goods.

**Wars of William and Mary.**—Privateers' instructions issued for the French war of 1689 contained no express declaration as to corn or contraband. They merely directed the bringing in of French ships and goods, "and such other ships, vessels, and goods as are or shall be liable to confiscation." No case in which corn was condemned as contraband has been discovered;

but from the history of the matter it would seem probable that it was so treated.

Privateers' instructions issued in 1693 contained the startling declaration that "corn . . . *whithersoever it be bound*" is to be good prize. These instructions were issued on May 2nd, 1693; six weeks afterwards (June 14th) the words in italics were struck out by warrant from the Queen.

**Queen Anne's War.**—The instructions for the war of 1702 contain a list of contraband articles, and neither corn nor victuals is amongst them. Probably the omission was in consequence of the Dutch treaty of 1674, by which such goods in Dutch ships were declared to be free. On April 28th, 1709, however, an Order in Council issued directing that all ships laden with corn for the enemy should be brought in, to be dealt with according to the Queen's pleasure. Whether by these words compulsory purchase was intended does not appear.

**Wars of the Eighteenth Century.**—Instructions to privateers issued during the wars of 1737, 1744, 1756, 1762, 1780, and 1796 enumerate articles which are to be prizable as contraband; none of them expressly included corn or victuals. But it seems to be clear that, at all events in some of these wars, corn in neutral ships bound to an enemy's port was seized and condemned. And this seizure of neutral ships was not always confined to ships bound to a port of the enemy. In at least one case during the war of 1744 a neutral (Dutch) ship bound to a neutral port (Genoa) with corn on board was seized, in order to prevent the possibility of the corn falling into the hands of the enemy. The Dutch skipper was offered the price of his corn by the English admiral who seized it, but he refused to take the money, and instituted proceedings against his captors in the English Admiralty Court. The admiral was defended by the Government.

**War of 1744: Origin of Statutory Pre-emption.**—S. 34 of the present Naval Prize Bill is the lineal descendant of an Act passed during the war of 1744. It reproduces almost word for word 19 Geo. II., c. 36, which was passed in 1746 for the sole purpose of relieving the Government of the day from a difficulty in which they found themselves unexpectedly placed. During that war it was of the last importance to England to prevent victualling stores, including corn, from reaching the enemy. To declare them to be contraband, if not a direct violation of existing treaties, would have been certain to raise violent opposition from Sweden and Holland. So in order to avoid raising the question of contraband, the Government adopted the half measure of pre-emption. But here they met with an insuperable obstacle in the Navigation Act (12 Chas. II., c. 18). By that Act goods of foreign growth or origin brought into this country by foreign ships not belonging to the country of which the cargoes were the produce were forfeited to the Crown and the informer; consequently purchase by the Government was impossible. The law officers indeed advised that the purchase should be made whilst

the cargoes were afloat, and that they should then be landed as the property of the King. This was obviously a mere evasion of the Navigation Act. The law officers' suggestion was not adopted, and the Act of 1746 was passed instead. It recites the Navigation Act, and enacts that it shall be lawful for the Commissioners of the Navy to buy for the service of the King "naval stores" in neutral vessels forcibly brought in, and that the customs officers may permit the same to be entered and landed, the Navigation Act notwithstanding.

Successive Prize Acts passed subsequently to 1746 have reproduced the enactment of that year, and the clause appears in the Bill of to-day. Its re-enactment by the Naval Prize Act, 1864, and by the present Bill seem to be wholly unnecessary, and may possibly give rise to misconception. At the present day the contention of England is that provisions other than victualling stores for the army or navy are not contraband. It will be noticed that the word "victualling" (stores) occurs in the present Bill, and does not occur in the Act of 1746. It occurs, in this connection, for the first time in the Prize Act of 1797 (33 Geo. III. c. 66, s. 47), and the circumstances under which that Act was passed may explain the reason for its insertion.

**War of 1793: Seizure of American Corn Ships.**—In May, 1793, the National Convention of France decreed that neutral corn ships bound for a port of the enemy (England) should be brought in and their cargoes condemned as prize. In June England retaliated by an Order in Council to the same effect. This Order was shortly afterwards revoked, re-issued in April, 1795, and shortly afterwards again revoked. Meanwhile many neutral corn ships had been seized and their cargoes condemned, and amongst these were some American ships and cargoes. The Government of the United States strongly protested against the action of the English Prize Court, and eventually the American owners of the ships and cargoes were indemnified by the English Government. Whilst this matter was being discussed, England and the States had concluded a treaty by which it was agreed that provisions "when becoming contraband according to the existing law of nations," should not be confiscated, but that they should be bought by the belligerent seizing them, and paid for. Before this treaty was ratified the Order in Council of April, 1795, had been issued, and shortly after the ratification of the treaty the Prize Act of 1797 was passed. In that Act for the first time an express power was given to purchase "victualling" as well as naval stores. Whether or no the insertion of the word "victualling" adds anything to the effect of the Act may be doubted, since corn had frequently been bought by the Government under the corresponding clause of previous Acts as "naval stores."

**Should the Clause be Re-enacted?**—The circumstances under which the Act of 1797 was passed, coupled with the fact that the American corn cargoes during the war of 1793 had been seized, not only as naval stores, but for

the purpose of distressing the enemy generally, together with England's previous action in the matter, lend colour to the suggestion that so long as the clause in question remains upon her Statute Book it is not open to England to contend that corn is not contraband. The objection taken by our Government in 1884 to the declaration made by France, during her operations in Tonkin, that rice was contraband, shows that, whatever she may have done in the past, England does not now assent to the view that victuals are by the law of nations contraband. On the whole, the reason for the enactment having passed away, it would seem better not to re-enact s. 34.

# NUMBER OF JUDGES IN DIFFERENT COUNTRIES.[1]

[*Contributed by* JOHN MACDONELL, ESQ., C.B., LL.D.]

I HAVE endeavoured to obtain information as to the number of judges in some other countries with a view to institute a comparison between them and England in this respect. By the courtesy of the Ministries of Justice and the Statistical Departments of various Governments, I am enabled to present information which, though very incomplete, has, so far as I know, never hitherto been collected. Such a comparison is more difficult than at first sight would appear. The term "judge" is very ambiguous. It may include officials with very different functions. In some countries work which here is performed by registrars, masters, and the like, devolves on "judges," "Richter," etc. It is not easy to say whether a particular functionary is a judge. The Masters in Lunacy, the Railway Commissioners, and the members of the Irish Land Commission would probably be regarded as judges; but there would be a difference of opinion as to Commissioners most of whose duties are administrative. In foreign systems of law there would be very great difficulty in making such a separation, as will appear from the statements which follow. There is in truth no universally accepted conception of the functions which belong to a judge.[2] There are, too, exceptional tribunals with special functions wholly different from those of the ordinary tribunals of the country; for example, tribunals of navigation and emigration, mining tribunals, etc. The figures given below as to English judges are open to criticism; they mix together judges whose time is wholly devoted to their duty as such, and those (such as recorders) who give to their judicial work only a small part of their time. The judicial systems of certain countries make large provision for the appointment of special judges or substitutes holding office, it may be, only for a short time. It is possible that those who have kindly supplied the details which follow have not always had in their minds precisely the same idea of a judge. The tables here printed must be studied in the light of the foregoing observations; but I do not

[1] This paper was originally intended for insertion in the *Civil Judicial Statistics*. It has been deemed advisable to print the paper in this journal.

[2] See M. Garsonnet's *Traité de Procedure*, i. 176, as to meaning of "*magistrat*."

think that any probable corrections would materially affect the results, which show a remarkable contrast between the English judicial system and systems elsewhere prevalent. At all events the figures are offered as tentative efforts to give precise ideas to a subject on which little information is accessible. I have not included figures as to the whole of the United States, first, because the system in most of the States is similar to our own, and, next, because there exists no complete enumeration, so far as I have been able to ascertain after communicating with the Department of Justice at Washington, of all the State judges.

JUDICIAL ESTABLISHMENT OF THE UNITED KINGDOM.

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| *England and Wales.* | | |
| House of Lords ... ... ... ... ... ... | 5 | — |
| Court of Appeal ... ... ... ... ... ... | 6 | — |
| High Court of Justice ... ... ... ... ... | 23 | — |
| County Courts ... ... ... ... ... ... | 55 | — |
| Courts of Quarter Sessions and Summary Jurisdiction | 155 | 17,248 |
| Other Courts ... ... ... ... ... ... | 32 | — |
| Total ... ... ... | 276 | 17,248 |
| *Scotland.* | | |
| The Court of Session ... ... ... ... ... | 13 | — |
| Sheriffs' Courts ... ... ... ... ... ... | 63 | — |
| Justice of the Peace Courts ... ... ... ... | — | Not ascertained. |
| Total ... ... ... | 76 | — |
| *Ireland.* | | |
| High Court of Justice ... ... ... ... ... | 15 | — |
| Court of Appeal ... ... ... ... ... ... | 2 | — |
| County Courts ... ... ... ... ... ... | 21 | — |
| Courts of Summary Jurisdiction ... ... ... ... | 74 | 4,897 |
| Total ... ... ... | 112 | 4,897 |
| TOTAL OF THE UNITED KINGDOM ... ... | 464 | 22,145 |

AUSTRIA.

From Vienna has been sent an elaborate "Uebersicht über das richterliche Personale bei den Gerichten der im Reichsrathe vertrenenen Königreiche und Länder Öst-ung Monarchie" according to the state of things on January 1st, 1901. The territory of the Kingdom of Hungary is excluded. In a note it is observed that judges within the meaning of the Staatsgrundgesetz are (1) in the highest Courts only the presidents, senate-presidents, and Hofräthe; (2) in the Oberlandesgerichte and the Courts of first instance the presidents, vice-presidents, Oberlandesgerichtes-Räthe,

Landesgerichte-Räthe, Bezirksrichter, and in the Courts of first Instance certain Court secretaries and Gerichts-Adjuncten.

There are no unpaid judges in the service of the State; but there are lay judges in the Handels-See-und Berg-Gerichte.

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Oberster Gerichtshoff:— | | |
| Presidents and Senator-Presidents ... ... ... | 6 | — |
| Hofräthe ... ... ... ... ... ... ... | 47 | — |
| Oberlandesgerichte:— | | |
| Presidents and Vice-Presidents ... ... ... | 15 | — |
| Oberlandesgerichte-Räthe ... ... ... ... | 181 | — |
| Courts of First Instance :— | | |
| Landesgerichte :— | | |
| Presidents and Vice-Presidents ... ... ... | 126 | — |
| Räthe ... ... ... ... ... ... ... | 1,032 | — |
| Secretaries and Gerichts-Adjuncten sitting as single Judges ... ... ... ... ... ... ... | 697 | — |
| Bezirksgerichte :— | | |
| Räthe ... ... ... ... ... ... ... | 555 | — |
| District Judges and Court Secretaries and Gerichts-Adjuncten sitting as single Judges ... ... | 1,882 | — |
| Total ... ... ... | 4,541 | — |

## Belgium.

Dr. Ch. de Launoy, Chef du Bureau de la Statistique au Ministère de la Justice, in a valuable communication on the subject, gives the number of judges in Belgium as follows:—

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Court of Cassation ... ... ... ... ... ... | 17 | — |
| Courts of Appeal ... ... ... ... ... ... | 91 | — |
| Courts of First Instance ... ... ... ... ... | 216 | 107 |
| Courts of Justice of the Peace ... ... ... ... | 222 | 448 |
| Commercial Courts ... ... ... ... ... ... | — | 199 |
| Total ... ... ... | 546 | 754 |

## Denmark.

The Director of the Bureau de Statistique de l'Etat remarks:—

En Danemark, règle générale, les juges sont salariés, comme vous le verrez du tableau ci-après. L'exception se borne aux juges à connaissances spéciales, commerciales ou maritimes, de la Cour maritime et commerciale de Copenhague; hors de Copenhague on peut nommer d'office de ces juges à connaissances spéciales, mais alors ils sont nommés *ad hoc* seulement, et encore cela arrive rarement.

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Supreme Court (including 12 assessors) ... ... | 13 | — |
| High Court at Copenhagen (including 18 assessors ... | 19 | — |
| Criminal and Police Court at Copenhagen (including 13 assessors) ... ... ... ... ... ... ... | 14 | — |
| Maritime and Commercial Court at Copenhagen ... | 1 | 40[1] |
| High Court at Viborg (including 8 assessors) ... ... | 9 | — |
| Courts of First Instance ... ... ... ... ... | 130 | — |
| Total ... ... ... | 186 | 40 |

## France.

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Court of Cassation ... ... ... ... ... ... | 49 | — |
| Courts of Appeal ... ... ... ... ... ... | 512 | — |
| Civil Tribunals of First Instance ... ... ... ... | 5,398 | — |
| Tribunals of Commerce ... ... ... ... ... | 1,844 | — |
| Total ... ... ... | 7,803 | — |

## Germany.

In a communication received from the Imperial Statistical Office it is said :—

Ueber die Ziffern der unbesoldeten Richter und zwar sowohl der unbesoldeten Berufsrichter, der Gerichtsassessoren, wie der Laienrichter (Schöffenrichter, Handelsrichter, Gewerberichter, Geschworenen)—können wir Angaben nicht machen.

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Total Number of Judges ... ... ... ... ... | 8,186 | — |

## Hungary.

In a communication from Dr. John Marshalks, Director of Judicial Statistics, Buda-Pesth, it is remarked :—

On affairs involving a claim of money up to 40 crowns (1 crown = about $\frac{5}{6}$ shilling), and also as to certain offences in Hungary, the magistrate of each community is competent to decide. There are nearly 17,000 communities in Hungary. The magistrates are elected, and have no fixed appointments. There

[1] Thirty commercial and ten maritime assessors.

are in Hungary four grades of Courts of justice : the Royal Curia (High Court of Justice), Royal Itélötábla, 67 Royal Törvényszék (nearly in each county), and 385 Royal Jarásbiróságok (nearly in each district). [1]

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Royal Curia :— | | |
| President and Vice-President ... ... ... ... | 2 | — |
| Presidents of Senates ... ... ... ... ... | 8 | — |
| Judges ... ... ... ... ... ... ... | 68 | — |
| Royal Itélötábla :— | | |
| Presidents ... ... ... ... ... ... | 11 | — |
| Presidents of Senates ... ... ... ... ... | 21 | — |
| Judges ... ... ... ... ... ... ... | 225 | — |
| Royal Törvényszék and Royal Járásbiróságok (first instance) :— | | |
| Presidents ... ... ... ... ... ... | 63 | — |
| Judges ... ... ... ... ... ... ... | 1,200 | — |
| Vice-Judges ... ... ... ... ... ... | 1,060 | — |
| Total ... ... ... | 2,658 | — |

## Italy.

The Director-General of Statistics, Signor di Negri, has kindly furnished the following interesting communication :—

Justice in Italy is administered—

(*a*) in civil matters by :
*Conciliatori* (justices of peace),
Prætors (*pretori*),
Civil tribunals,
Courts of Appeal,
Courts of Cassation ;

(*b*) in penal matters by :
Prætors (*pretori*),
Penal tribunals,
Courts of Appeal,
Assize Courts,
Court of Cassation (in Rome).

The *conciliatori* are unsalaried magistrates, with competence exclusively in the civil matters. In each commune is an *office of conciliation* composed of one *conciliatore* and one or more *viceconciliatori*. Some communes have many offices of conciliation. They, as justices of peace, settle controversies voluntarily submitted to their examination, and, as judges, decide causes of a value not exceeding 100 lire.

The prætors (*pretori*) judge in first instance, as regards civil matters, the causes of a value not exceeding 1,500 lire, and in appeal causes judged in first instance by the *conciliatori*. In penal matters the jurisdiction of the prætors extends to all offences punishable by imprisonment not exceeding three months, or confinement

[1] Dr. Marshalks gives some details as to the salaries of the judges: President of the Royal Curia, £1,041 13*s.* 4*d.*, with £125 allowance for rent ; Vice-President, £875, with rent allowance of £125 ; 8 presidents of the Senate, £500, with allowance of £83 6*s.* 8*d.* ; 33 judges, £416 13*s.* 4*d.*, with allowance of £83 6*s.* 8*d.* ; 35 judges, £333 6*s.* 8*d.*, with allowance of £83 6*s.* 8*d.* In the Royal "Itélötábla" the salaries range from £500, with allowance of £83 6*s.* 8*d.*, to £166 13*s.* 4*d.* for 11 Presidents, to £208 6*s.* 8*d.* or £250, with £40 to £66 13*s.* 4*d.* allowance, for 225 judges. In the other Courts the salaries vary from £333 6*s.* 8*d.*, with allowance of £66 13*s.* 4*d.*, to £91 13*s.* 4*d.*, with £16 13*s.* 4*d.* allowance. The total remuneration of 2,658 Royal judges was £490,600 8*s.* 4*d.*

not exceeding one year, or by fine not exceeding 1,000 lire. Appeal from the sentences of the prætors is allowed to the penal tribunals.

The tribunals in civil matters and in the first instance are competent to try controversies of a value exceeding 1,500 lire, and on appeal all causes judged in first instance by the prætors. In penal matters they have jurisdiction in the first instance in offences punishable by imprisonment from three to five years, or by fine exceeding 1,000 lire. Appeal is allowed to the Courts of Appeal.

Attached to each penal tribunal there is an "Ufficio d'Istruzione," composed of one or more judges (examiners), charged to enquire into penal proceedings. They have a supplementary appointment of 400 lire a year.

The Assize Courts, composed of one Councillor of Appeal as President, and two judges of tribunal as assistants, with the assistance of the jury, have exclusively penal jurisdiction in all proceedings concerning crimes of a serious character, and the offences against internal and external security of the State.

The Courts of Cassation in civil and penal matters have the power of reversing, for illegality, the sentences passed by inferior Courts or tribunals, not subject to appeal. The Supreme Court of Rome is exclusively competent in penal matters.

The functions of public prosecutor before the tribunals and the Courts are performed by special magistrates named "*Pubblico Ministero*"—*i.e.*, *Procuratori del Re*, and *Sostituti Procuratori del Re* before the tribunals; *Procuratori Generali* and *Sostituti Procuratori Generali* before the Courts (of Appeal and Cassation). In the Court of Cassation of Rome there is also one *Avvocato Generale*.

The judicial training of the magistracy is acquired as *uditore* (unsalaried) and *aggiunto giudiziario*. The *uditori giudiziari*, after six months of judicial practice, and the *aggiunti giudiziari* may be authorised to perform the functions of *vice-pretori*. In this case the *uditori* have a salary of 100 lire a month.

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Conciliatori ... ... ... ... ... ... | — | 8,470 |
| Uditori giudiziari ... ... ... ... ... | — | 250 |
| Aggiunti giudiziari ... ... ... ... ... | 250 | — |
| Pretori ... ... ... ... ... ... | 1,549 | — |
| Tribunali civili e penali:— | | |
| Presidenti ... ... ... ... ... ... | 162 | — |
| Vice Presidenti ... ... ... ... ... | 83 | — |
| Giudici ... ... ... ... ... ... | 1,023 | — |
| Corti di Appello:— | | |
| Primi Presidenti ... ... ... ... ... | 20 | — |
| Presidenti di Sezione ... ... ... ... | 32 | — |
| Consiglieri ... ... ... ... ... | 424 | — |
| Corti di Cassazione:— | | |
| Primi Presidenti ... ... ... ... ... | 5 | — |
| Presidenti di Sezione ... ... ... ... | 3 | — |
| Consiglieri ... ... ... ... ... | 94 | — |
| Total[1] ... ... ... | 3,645 | 8,720 |

[1] The salaries of the 5 Chief Presidents of the Corti di Cassazione are £600; those of the 94 *consiglieri*, £360; those of the *Primi Presidenti* of the Courts of Appeal, £480; those of the 424 *consiglieri*, £200 to £280; those of the 162 presidents of the Civil and Criminal Courts, £200 to £280; and the 1,549 *pretori* are each paid £112."

## The Netherlands.

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Supreme Court :— | | |
| President and Vice-President ... ... ... ... | 2 | — |
| Counsellors ... ... ... ... ... ... | 13 | — |
| Five Courts of Appeal :— | | |
| Presidents and Vice-Presidents ... ... ... | 10 | — |
| Counsellors ... ... ... ... ... ... | 43 | — |
| Twenty-three Courts of First Instance :— | | |
| Presidents and Vice Presidents ... ... ... | 40 | — |
| Judges ... ... ... ... ... ... ... | 123 | — |
| Judges *in loco* ... ... ... ... ... ... | — | 80 |
| One hundred and seven Cantonal Courts :— | | |
| Judges of the Peace ... ... ... ... ... | 107 | — |
| Judges *in loco* ... ... ... ... ... ... | — | 291 |
| Total [1] ... ... ... | 338 | 371 |

## Norway.

The following interesting account of the Norwegian Courts is sent by Mr. A. N. Kier, head of the Statistical Central Bureau :—

I.

*Supreme Court*, passing sentence in the last resort in all civil suits and also in certain kinds of the decisions in criminal cases. This Court has, besides the Lord Chief Justice, thirteen permanent members and nine members appointed in special cases. These are all salaried.

II.—*Civil Jurisdiction.*

1. *First Instance.*—The ordinary inferior tribunal is vested in the *sorenskriver* (country judge) in the country, and the *byfoged* (city judge) in the cities. There are altogether eighty-two *sorenskrivers*, each having his district, and twenty-three *byfogeds*. The smaller towns are within the adjacent country judges' district. In Christiania and Bergen there are Collegiate Courts, "Byretter" (Municipal Courts) composed in Christiania of the Chief Justice and fourteen assessors, in Bergen of the Chief Justice and two assessors. All these are salaried.

For some special suits—for instance, maritime cases, cases pertaining to real

[1] The same communication states: "There is no jury in the Netherlands; the counsellors, judges, attorneys, and clerks are salaried, except the judges *in loco*."
The numbers of attorneys and clerks are as follows :—

| | |
|---|---|
| Supreme Court—1 Attorney-General, 3 substitute Attorneys-General, 1 Clerk, and 2 substitute Clerks ... ... ... ... ... | 7 |
| Courts of Appeal—5 Attorneys-General, 6 substitute Attorneys-General, 5 Clerks, and 6 substitute Clerks ... ... ... ... ... | 22 |
| Courts of First Instance—23 Attorneys, 33 substitute Attorneys, 23 Clerks, and 33 substitute Clerks ... ... ... ... ... ... | 112 |
| Cantonal Courts—107 Clerks and 40 Attorneys ... ... ... ... | 147 |
| | 288 |

property (requiring local enquiries), and disputes between craftsmen and their employers—are appointed lay assessors. Of the latter, two are regularly picked out of a choice made by the Municipal Council.

All cases are brought before a Court of Conciliation prior to their coming before the tribunal. There are 611 districts of Court of Conciliation, with two conciliators each. The latter can also judge simple cases when the question is as to small amounts, but they cannot be considered judges; they are non-salaried, performing duties of honour, receiving, however, fees from the parties.

2. The *Superior Courts*, pronouncing judgment in the second instance. There are three superior Courts, each with a Chief Justice, and two of them with two assessors, one with four assessors.

3. In bankruptcy matters is appointed a chief Board of Liquidation, to which the case is appealed and which is vested in a chairman and two salaried judges-lateral.

The liquidation of bankruptcies as well as of estates of deceased persons is heard by the ordinary inferior Courts, but the following cities have their own Probate Courts: Bergen (one judge), Stavanger (one), and Christiania (two).

### III. *Criminal Jurisdiction.*

Petty cases are heard by the "Meddomsret." The graver cases and cases decided by the Meddomsret are heard by the "Lagmandsret" (jury).

The Meddomsret is vested in the ordinary inferior judge and two lay assessors as *domsmænd*. In one country district and two cities there is appointed a special judge dealing with these cases. The Lagmandsret is vested in one *lagmand* (there are altogether five of them) and two judges-lateral (ordinary judges performing this duty as an extra function) besides ten *lagrettemænd*.

The *meddomsmænd* and *lagrettemænd* are picked out of a choice selected by the Municipal Council; they receive no salary, but are allowed travelling expenses.

From the above it will be seen that there are really no unsalaried judges in Norway, though lay fellow-judges are appointed as well in certain civil cases as in all criminal ones in particular.

Altogether the number of salaried judges is 172, of whom eleven (nine members of the Supreme Court and two judges-lateral of the chief Board of Liquidation) perform the duty as judges in addition to their ordinary occupations.

Finally there are six military judges (five for the army and one for the navy).

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Supreme Court ... ... ... ... ... ... | 23 | — |
| Courts of Civil Jurisdiction :— | | |
| First Instance ... ... ... ... ... ... | 123 | 1,222 |
| Superior Courts of Second Instance ... ... ... | 11 | — |
| Appeal Court in Bankruptcy ... ... ... ... | 3 | — |
| Probate Courts ... ... ... ... ... ... | 4 | — |
| Courts of Criminal Jurisdiction ... ... ... ... | 8 | 10 |
| Total ... ... ... | 172 | 1,232 |

## Russia.

A very complete and detailed account of the members of the judicature in European Russia on January 1st, 1901, has been kindly forwarded by the Russian Ministry of Justice. Among the chief facts mentioned are these :—

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Criminal Court of Appeal :— | | |
| Sitting in the Court | 1 | — |
| Senators | 20 | — |
| Civil Court of Appeal :— | | |
| Sitting in the Court | 1 | — |
| Senators | 25 | — |
| Courts of Justice :— | | |
| Senior Presidents | 10 | — |
| Civil Department :— | | |
| Presidents | 23 | — |
| Members | 105 | — |
| Criminal Department :— | | |
| Presidents | 15 | — |
| Members | 85 | — |
| Circuit Courts and Justices of the Peace :— | | |
| Circuit Courts :— | | |
| Presidents | 88 | — |
| Assistant Presidents | 155 | — |
| Members (Civil Section) | 408 | — |
| Members (Criminal Section) | 415 | — |
| County Members | 382 | — |
| District Justices of the Peace | 901 | — |
| Additional Justices of the Peace | 73 | — |
| City Judges | 406 | — |
| Assistants of the Justices of the Peace | 37 | — |
| Commercial Courts :— | | |
| Presidents | 4 | — |
| Assistant Presidents | 7 | — |
| Members | 12 | — |
| Candidates for Membership (with the rights of Members) | 7 | — |
| Total | 3,180 | — |

## Sweden.

From Dr. Georg Carlson, Chief of the Statistical Bureau of the Ministry of Justice, has been received this valuable communication as to the judges of Sweden :—

En ce qui concerne les tribunaux de *première instance*, il faut remarquer d'abord que les villes forment des districts judiciaires distincts des campagnes. Les campagnes sont divisées en 119 juridictions (*domsaga*, pl. *domsagor*) chacune avec son juge (*haraedshoefding*). Le tribunal cantonal se compose du juge comme président et de 12 assesseurs non légistes et non retribués, dont au moins sept doivent être présents. Si les avis sont partagés, le vote du juge décide, à moins que tous les assesseurs présents ne soient unanimes. Le juge est donc en réalité le seul qui juge et l'influence de l'élément populaire consiste surtout en la connaissance, qu'ont les assesseurs des personnes et des rapports du district.

Le traitement du juge (*haeradshoefding*) varie entre un minimum de 4,700 et un maximum de 8,900 couronnes (1 cour. = 1 franc 40 centimes). Par rapport au traitement du juge les juridictions peuvent être groupées comme suit :

| Traitement. | Nombré de Juridictions. |
|---|---|
| 4,700 cour. ... ... ... ... ... ... ... | 2 |
| 5,100–5,500 cour. ... ... ... ... ... ... | 13 |
| 5,600–6,000 „ ... ... ... ... ... ... | 52 |
| 6,100–6,500 „ ... ... ... ... ... ... | 25 |
| 6,600–7,000 „ ... ... ... ... ... ... | 17 |
| 7,100–7,500 „ ... ... ... ... ... ... | 7 |
| 7,600–8,000 „ ... ... ... ... ... ... | 2 |
| plus de 8,000 „ ... ... ... ... ... ... | 1 |
| | 119 |

En plus, les juges ont des émoluments qui consistent principalement en droits sur les procès-verbaux et d'autres expéditions. Les juges devant payer eux-mêmes les frais d'administration (assistant judiciaire, copiste, certains voyages, etc.), c'est pour les couvrir que leur sont accordés ces émoluments, qui donnent cependant un excédant assez considerable. Les revenus du juge sont donc plus grands que le traitement fixe. En effet, ce n'est que par exception qu'un juge ait moins de 7,000 cour. par an. Dans un grand nombre de juridictions les revenus peuvent monter à 8,000 ou 9,000 cour., et dans quelques-unes à 10,000 cour. ou même davantage. Pour certaines causes relatives à la délimitation des terres, il y a des tribunaux de partage, composés du juge du canton et de trois assesseurs experts, dans les questions agricoles, élus par les habitants et ayant le vote individuel. Ces derniers n'ont pas de traitement.

Le tribunal de la ville se compose d'un mair (*borgmástare*, *bourgmestre*) et de deux échevins au moins. Les villes payent elles-mêmes leurs juges. On n'a pas publié de compte rendu officiel des traitements de ces fonctionnaires, mais je peux toujours dire que les maires des grandes villes et de villes moyennes ainsi que les échevins à Stockholm et Gothembourg, peut-être dans une ou deux autres villes encore, ont des revenus comparables à ceux des juges des campagnes.

En *deuxième instance* fonctionnent les trois cours royales (*hofrœtter*) savoir celles de Svea, de Göta et de Skäne-Blekinze. Les cours royale ont chacune un président qui a un traitement de 10,000 cour. Les membres sont de deux classes, conseillers et assesseurs, dont la compétence et les fonctions sont les mêmes. Les assesseurs avancent à l'ancienneté au grade de conseiller.

Montant des traitements : d'un assesseur 5,300 cour. par an et au bout de cinq années de service comme assesseur 5,800 cour. par an ; d'un conseiller 6,400 cour. par an et au bout de cinq années de service 7,000 cour. par an.

| | Nombres des Conseillers. | Nombres des Assesseurs. | Total. |
|---|---|---|---|
| de Svea ... ... ... ... | 14 | 21 | 35 |
| „ Göta ... ... ... ... | 8 | 12 | 20 |
| „ Skäne-Blekinze ... ... | 4 | 6 | 10 |
| | 26 | 39 | 65 |

' Ils sont partagés par divisions de 5 membres (2 conseillers et 3 assesseurs) chacune. Ces divisions sont au nombre de 7 :—

A la Cour Royal de Svea, de 4,
„ „ Göta, et de 2,
„ „ Skäne-Blekinze, 1.

Le président et les membres d'une cour royale n'ont pas de revenus en sus du traitement fixe.

Les membres de ces cours ne sont point mieux rétribués que les juges des campagnes—plutôt le contraire,—vu le revenu extra assez considérable de ceux-ci grâce à l'excédent des émoluments sur les frais qu'ils doivent couvrir. Les juges des campagnes sont très considerés ; étant d'ailleurs bien payées, il n'est pas rare que ces fonctions soient recherchées pas des membres des cours royales et d'autres fonctionnaires d'un rang plus elevé.

La Cour Suprême est composée de 18 membres légistes (conseillers de justice) dont chacun joint d'un traitement annuel de 10,000 cour., égal à celui du président d'une cour royale. Le Président de la Cour Suprême est S. M. le Roi, qui ne prend cependant pas part aux délibérations, auxquelles préside le membre le plus ancien.

Les causes sont préparées dans une administration spéciale, le Conseil des référendaires à la Cour Suprême, dont les membres font ensuite les rapports des causes devant la Cour Suprême. Les 13 référendaires ont un traitement de 5,800 à 6,400 à 7,000 cour.

Les tribunaux militaires de première instance se composent de 4 officiers et d'un membre légiste. Le traitement de celui-ci est peu considérable, car le travail au tribunal ne prend qu'une très petite partie de son temps. Les membres militaires ne sont pas payés extra pour cette charge.

En deuxième instance il y a une Cour Royale Militaire, composée également de 4 Militaires et d'un membre légiste (conseiller). Celui-ci a un traitement de 4,500 cour. Les membres militaires ont moins.

On peut appeler à la Cour Suprême dans laquelle siègent, pour les causes de justice militaire, 2 officiers generaux, qui remplissent cette fonction sans remunération.

La Cour des Comptes se composé d'un Président (traitement 10,000 cour.) et de 8 conseillers (traitement égal à celui des conseillers des cours royales).

L'Etat n'accorde pas de résidence ni de loger à aucun des juges des différentes instances.

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Courts of First Instance ... ... ... ... ... | 389 | 1,428 |
| Three Royal Courts of Second Instance ... ... ... | 68 | — |
| Supreme Court ... ... ... ... ... ... | 31 | — |
| Cour des Comptes ... ... ... ... ... ... | 9 | — |
| Total ... ... ... | 497 | 1,428 |

SWITZERLAND.

The position of Switzerland is peculiar. Each of the twenty-two cantons has its own judicial organisation and its own laws as to payments of judges. "The classes of judges," it is stated, in a communication kindly furnished from the Federal Department of Justice at Berne, "who are partly salaried, partly paid by fees, vary in the cantons."

According to the Bundesgesetz über die organisation der Bundesrechtspflege of March 22nd, 1893, the Federal Court (Bundesgericht) consists of—

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Members ... ... ... .. ... ... ... | 14 | — |
| Suppléants ... ... ... ... .. ... ... | 9 | — |
| Total ... ... ... | 23 | — |

As an example of the cantonal judicial system I take from Adams and Cunningham's *Swiss Confederation* (p. 1120) the following details as to one canton, the Canton de Vaud :—

*Judicial Establishment of the Canton de Vaud.*

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Cantonal Tribunal ... ... ... ... ... ... | 9 | — |
| Nineteen Tribunals of Districts :— | | |
| Presidents (1 for each Tribunal) ... ... ... | 19 | — |
| Judges (4 for each Tribunal) ... ... ... ... | 76 | — |
| Judges of the Peace (1 for each *Cercle*) ... ... ... | 60 | — |
| Total ... ... ... | 164 | — |

*Summary of the Number of Judges, Salaried and Unsalaried, of certain countries, together with the proportions per* 100,000 *of estimated population.*

| Country. | Number of Judges. | | | Number of Judges per 100,000 of estimated population. | | |
|---|---|---|---|---|---|---|
| | Salaried. | Unsalaried. | Total. | Salaried. | Unsalaried. | Total. |
| England ... ... | 276 | 17,248 | 17,524 | 0·86 | 53·70 | 54·56 |
| Scotland ... ... | 76 | — | — | 1·76 | — | — |
| Ireland ... ... | 112 | 4,897 | 5,009 | 2·49 | 108·80 | 111·29 |
| Austria ... ... | 4,541 | — | — | 17·35 | — | — |
| Belgium ... ... | 546 | 754 | 1,300 | 8·01 | 11·05 | 19·06 |
| Denmark ... ... | 186 | 40 | 226 | 7·76 | 1·67 | 9·43 |
| France ... ... | 7,803 | — | 7,803 | 20·16 | — | 20·16 |
| Germany ... ... | 8,186 | — | — | 14·63 | — | — |
| Hungary ... ... | 2,658 | — | — | 13·79 | — | — |
| Italy ... ... | 3,645 | 8,720 | 12,365 | 11·37 | 27·21 | 38·58 |
| Netherlands ... | 338 | 371 | 709 | 6·53 | 7·17 | 13·70 |
| Norway ... ... | 172 | 1,232 | 1,404 | 7·83 | 56·08 | 63·91 |
| Russia ... ... | 3,180 | — | — | 2·80 | — | — |
| Sweden ... ... | 497 | 1,428 | 1,925 | 9·70 | 27·87 | 37·57 |
| Switzerland :— | | | | | | |
| Federal Court ... | 23 | — | — | ·70 | — | — |
| Canton de Vaud | 164 | — | — | — | — | — |

Some remarks may be made on these figures which can be, as already stated, only approximately correct. Obviously the figures for those foreign countries tell of judicial systems very unlike ours; systems with far more salaried judges than with us, and with assistant judicial functionaries unknown here; systems with fewer unpaid magistrates than are found in England.

Note.—It is difficult to obtain full and accurate information as to the total number of judges in the United States of America. There exists a Federal as well as a State judicial system; and the term "judge" is used somewhat loosely. The circumstances of the various States vary so much that figures which would include those for New York and Louisiana, Massachusetts, and Dakota would not be instructive. I have been kindly furnished with a copy of the *Register of the Department of Justice* at Washington, which gives the number of Federal judges as follows :—

| | Number of Judges. | |
|---|---|---|
| | Salaried. | Unsalaried. |
| Supreme Court ... ... ... ... ... ... | 9 | — |
| Court of Claims ... ... ... ... ... ... | 5 | — |
| Circuit Courts of Appeal ... ... ... ... ... | 25 | — |
| Circuit and District Courts (including Territorial Courts) | 86 | — |
| District of Columbia (Court of Appeals, 3; Supreme Court, 6) ... ... ... ... ... ... ... | 9 | — |
| Total ... ... ... ... | 134 | — |

In England the Courts of first instance consist of one judge; this holds good of the superior as well as the inferior Courts; the Appellate Jurisdiction Act, 1876, s. 17, declares that "every action and proceeding in the High Court, etc., shall, so far as is practicable and convenient, be heard, etc., before a single judge." This is not true of Continental States, in all of which the Courts (with some exceptions) consist of three or more judges.

As to France, M. Garsonnet observes—

> Un autre caractère des juridictions Francaises c'est quelles se composent presque toutes de plusieurs juges et ne peuvent juger valablement que si un certain nombre d'entre eux ont pris part au jugement. La pluralité de juges a toujours été reputée chez nous une garantie très efficace de bonne justice.

M. Garsonnet mentions five exceptions, of which the only important one is the case of *juges de paix*.[1]

A tribunal of first instance is composed of a president, one or more vice-presidents, judges, and *juges suppléants*; there being three, four, seven, eight, nine, ten, or twelve judges, and there being three *juges suppléants* in Courts of three or four judges, four in those of seven or ten, ten in those of twelve judges.[2]

No judgment of a Court of first instance can be given by fewer than three judges, including the president, in civil and correctional matters, or by more than six.[3]

Each Court of Appeal has in addition to a president and presidents of chambers, at least twenty counsellors and at most forty. In the Courts of Appeal no decree (*arrêt*) can be given in civil matters by fewer than seven counsellors including the president, and in criminal matters by fewer than five counsellors, the president included.[4]

The Cour de Cassation is composed of forty-nine members. Each chamber can judge only with a minimum of eleven members.[5]

In Germany much the same system prevails. The one judge is the exception; a tribunal consisting of three or more judges is normal. That was held in the discussion on the Judicial Organisation Statute of 1877 to be the

[1] *Traité, etc., de Procédure*, i. 67. See also the interesting note as to the systems prevalent in other countries.

[2] Garsonnet, i. 104.

[3] *Ibid.* i. 114.

[4] *Ibid.* i. 138.

[5] *Ibid.* i. 159. The number of judges has greatly increased in France. It appears that there were about four hundred tribunals of first instance in France in 1815 (*Réflexions sur la Proposition tendante à la Réduction des Tribunaux*, p. 4). There are now more than ten times as many. I take this from M. Hanotaux's "Impressions de France," *Revue des Deux Mondes*, 1901, p. 23. With reference to the Department of Aisne, with 541,000 inhabitants, he says: "Le Département de l'Aisne relève de la Cour d'Appel d'Asnières. Laon n'qu'un tribunal de première instance ainsi que les autres arrondissements. Cela fait dont 5 tribunaux de

best guarantee of justice. In the Amstgerichte one judge administers justice; but the tribunal is, as a rule, composed of two members. Usually three judges sit, but in some cases seven is the minimum (Arts. 77, 81, 109, and 140 of the Gerichtsverfassungsgesetz).

The Italian civil tribunals decide by three members; the Courts of Appeal by five. The Italian Corti di Cassazione sits with the number of seven members.

In some of the Austrian Courts three form the minimum; in the Oberlandesgerichte five form a quorum (Arts. 7 and 8 of the Law of 1895).

One consequence is that, as the above table shows, the numbers of salaried judges greatly exceed in Continental countries those in England. The contrast between the latter and, say, France is remarkable.

A further contrast is in the salaries of the judges. I give a few examples:—

UNITED STATES.

| | £ |
|---|---|
| Chief Justice of Supreme Court ... ... ... ... ... | 2,100 |
| Associate Justices ... ... ... ... ... ... each | 2,000 |

*District of Columbia.*

| | |
|---|---|
| Chief Justice of Court of Appeal ... ... ... ... ... | 1,300 |
| Associate Judges ... ... ... ... ... ... each | 1,200 |

FRANCE.

| | |
|---|---|
| Court of Cassation:— | |
| First President ... ... ... ... ... ... ... | 1,200 |
| Three Presidents of Chambers ... ... ... ... each | 1,000 |
| Counsellors ... ... ... ... ... ... ... | 720 |
| Court of Appeal (Paris):— | |
| First President ... ... ... ... ... ... ... | 1,000 |
| Nine Presidents of Chambers ... ... ... ... each | 550 |
| Counsellors ... ... ... ... ... ... each | 440 |
| Other Courts of Appeal:— | |
| First Presidents ... ... ... ... ... ... each | 720 |
| Presidents of Chambers ... ... ... ... each | 400 |
| Counsellors ... ... ... ... ... ... each | 280 |

The *juges de paix* are divided into nine classes, with remuneration ranging from £320 (in Paris) to £72 elsewhere.

première instance avec 76 presidents, juges, et greffiers. En autre il y a des tribunaux de Commeree à Saint Quentin, Choissy, Verbins, Soissons, des conseils de prudhommes à Saint Quentin, à Bohain et à Guise." Contrast these figures with the number of local Courts in, say, Gloucestershire or Somersetshire, with a similar population. As to the local Courts in Germany, see Introduction by M. Dubarle to his translation of the Gerichtsverfassungsgesetz. In carrying out the Law of 1877 were suppressed one supreme tribunal (with 73 members), 14 First Courts of Appeal (with 14 first presidents, 136 vice-presidents, and counsellors), 39 tribunals of first instance (with 127 judges).

GERMANY.

| | £ |
|---|---|
| President of the Reichsgericht (with allowance for rent) ... | 1,250 |
| Presidents of Chambers (with allowance for rent) ... each | 700 |
| Counsellors (with allowance for rent) ... ... ... each | 600 |

The remuneration of the presidents of the Oberlandesgerichte vary from £427 to £800; presidents of chambers from £306 to £700; counsellors, £200 to £600.

In the Landgerichte the salaries of the presidents range from about £200 to £500 or £600.[1]

The judicial remuneration in Italy is even smaller, as appears above.

A characteristic of the remuneration of the judges in Sweden, as explained in Dr. Carlson's interesting memorandum, is that they are paid partly in fees by the parties. Another peculiarity is that the judges in country districts are better paid than those in towns.

It is unnecessary for me to draw attention to the contrast between the above salaries and the judicial salaries in England (*e.g.*, the Lord Chief Justice, £8,000; the Master of the Rolls, £6,000; the judges of the Supreme Court, £5,000). Nor need I add that the above figures, important though they are, are by no means conclusive as to the comparative cost of the administration of justice.

[1] I take these figures from M. Dubarle's *Code d'Organisation Judiciaire Allemand*. The subsequent changes are, I understand, slight.

# EXTRA-TERRITORIAL JURISDICTION IN HONG-KONG.

[*Contributed by* A. M. Latter, Esq.]

To judge correctly of the success of the extra-territorial system it is necessary to watch its workings in a community essentially cosmopolitan, and probably there is nowhere to be found a more mixed collection of nationalities than in the treaty ports along the coast and rivers of China. The whole system culminates in the large port of Shanghai, where there are resident from seven to eight thousand foreigners and many more than half a million Chinese. It is here that his Britannic Majesty's Supreme Court for China and Corea sits, which is a Court both of first instance in Shanghai and of appellate jurisdiction from the Consular Courts of other treaty ports in China. The judicial centre of all the other Powers is also in Shanghai.

**Basis of the Extra-territorial Court.**—The broad principle on which the system of extra-territorial Courts rests is that in the case of any litigation, dispute, or charge, whether civil or criminal, the tribunal shall be the tribunal of the defendant's nationality, administering the laws at that time in force in the country of that defendant. That right was secured to the British by the treaty of Tientsin, 1858, Arts. 15, 16, and 17 ; to the French by the treaty of Tientsin, 1861, Art. 35 ; and all the other Powers have at various times secured similar privileges. By the operation of the most favoured nation clause, Art. 24 of the treaty of Tientsin, 1858, between China and the United States of America has secured to European Powers the right of trying claims against their subjects by their own officers sitting alone without the intervention or assistance of the Chinese authorities. Claims, however, against Chinese subjects are tried by the Chinese magistrate with the assistance of an assessor of the plaintiff's nationality. (See, as to the workings of a similar system in Japan under the old treaties, *The Imperial Japanese Government* v. *P. and O. Company*, 1895, A.C. pp. 652, 653.)

"**Quot Gentes, tot fora.**"—The result is that there are as many Courts sitting in Shanghai as there are nationalities, and that claims must always be presented in the national Court of him against whom the claim is made. It is proposed to consider these Courts, first as touching their inherent power and capacity, and secondly as to the nature of the law administered in them.

**Foreign Plaintiff in British Court.**—In the first place it should be noticed that where a plaintiff comes into the Court of a defendant of a different nationality to his own, the Court has no control or power over that plaintiff. In the British Court, by the Order in Council of 1886, s. 2, sub-s. *b*, it is provided that a foreign plaintiff shall first of all file a submission to the British jurisdiction, but it is doubtful if this submission is worth the paper it is written on. If the foreigner perjures himself, or in any way conspires to defeat the ends of justice, the British Court would have no power to punish him except by a prosecution in his own Court, and in so far as the laws of that Court recognise the criminality of his conduct. Similarly, if the defendant is not successful in his defence, but has a valid counterclaim against the plaintiff equal to or exceeding the amount of the claim, not only is the Court unable to enforce this counterclaim, but even to entertain it (*The Imperial Japanese Government* v. *P. and O. Company*, 1895, A.C. 644). The practical hold that the Court has over a foreign plaintiff is limited to the actual amount of that plaintiff's property which it is able to bring into its physical possession.

**Security for Costs.**—For this reason all the European Courts in practice demand a considerable security for costs to be deposited on presentation of a claim. The Chinese or Mixed Court is the only Court where this practice is not in force. In the British Court it is provided by Order in Council, 1886, s. 2, sub-s. *b* (iii), that the Court may order security to be given to its satisfaction, and it has been held that this may be done at any stage of the proceedings (*Hung Chee Foo*: *North China Herald*, September 15th, 1887). A different but highly important limitation on the powers of the exterritorial Courts concerns the law that they are empowered to administer in questions of land.

**Land and the "Lex loci."**—The principle that the law that governs land is the *lex loci* must be assumed to hold good, and consequently theoretically it is the Chinese law that must be administered by the British and other European Courts in China. In practice, however, lawyers have always assumed that English law applies in Shanghai, and the English form of conveyance is employed. It was held by Sir Nicholas Hannen C.J. in 1899 (*Watson* v. *Hanson*: *North China Herald*, June 12th, 1899, vol. lxii. p. 1078) that English law governed the distribution of the real estate situate in China of a deceased person; but it seems that this decision is now vitiated by the recent decision of the Privy Council on appeal from Zanzibar (*The Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*, 1901, A.C. 373). The result of that decision would appear to be that in land cases the British Court not only must administer Chinese law or the *lex loci*, but that it must take judicial cognisance of the law of China and administer it as a Chinese authority (*ubi sup.* at p. 385).

**The British System: Separation of Judicial and Executive Offices.**—To turn from the extent of the jurisdiction of the various extra-territorial Courts

to the mode in which the law is administered by them, it is at the outset necessary to draw a clear distinction between the law administered by the British Supreme Court and that administered by all the others. The British system is the only one in which the judicial office is severed from the executive, and in which there is a judge whose duties are judicial and nothing else. The Chief Justice of his Britannic Majesty's Court consequently sits as a judge at home, and may be expected to administer justice with the same impartiality. All the other Powers vest their judicial authority in their respective consulates, and the Consul-General or delegate of the consular office sits as the judge of the Court. The fact that the duties of a consul are in the first place executive necessarily tends to vitiate his capacity as a judge. The consular officials are not necessarily—and seldom in fact are—members of the legal profession, and the fact that it is the first duty of a consul to protect his own subjects necessarily clashes with his first duty as a judge.

**The Chinese Mixed Court.**—The same causes militate against the success of the Mixed Court, wherein a Chinese magistrate sits as judge with the assistance of an assessor of the plaintiff's nationality. Both the assessor and magistrate are too apt to become advocates of their respective nationalities and to bring matters to a deadlock or an unsatisfactory compromise. More seriously does this Court suffer from the want of legal training on the part of the tribunal and the absence of any system of law which it is supposed to administer. As an instance of the first may be quoted a Mixed Court judgment of which the writer has personal knowledge. "This case involves very many difficult points, and the parties must settle the matter among themselves and not cause any further litigation." As to the law that is administered in the Mixed Court, it is by treaty the law of the defendant's nationality; that is to say, Chinese law.

—— **Its Defects.**—But the law of China is practically limited to criminal law, and is totally inadequate to the needs of the commercial communities at the treaty ports. The result is that the only idea of the law to be there administered both among the legal practitioners when in that Court and in the Court itself is a general idea of what is fair. The inherent capacity of such a Court to develop a system of the law of the custom of the port is wrecked by an unsatisfactory system of reporting and a multiplicity of assessors of various nationalities who do not consider themselves bound by previous decisions of the Court. There is a natural tendency to refer all commercial disputes to the arbitration of a merchant in the place, and this merchant attempts to decide the case according to his idea of the custom of the port. But the privacy of arbitration prevents these customs from ever crystallising, and there is, further, a natural tendency on the part of a foreign merchant to decide that the custom is against the Chinese.

**The Extra-territorial Court of the Future.**—It will appear from the above that the exterritorial system is in its workings not a little confused. Every

civilised nation has its own Court, each administering its own laws, and with one exception through a tribunal not composed of professional men, while the busiest Court of them all, the Chinese or Mixed Court, does not profess to administer any system of law at all. It is clear that with the growing size and importance of the European communities at Shanghai and elsewhere the system cannot last very long. The germ of the future administration of justice is perhaps to be found in the Court of Consuls, the Court in which suits against the Municipal Council, the governing body of Shanghai, must be brought. This is a Court which is established by the Land Regulations for the foreign settlements of Shanghai, and sanctioned by a memorandum signed by the Ambassadors or Charges d'affaires of Great Britain, Germany, France, Russia, and the United States of America, and dated October 21st, 1869. This Court consists of a selection of the consuls of the various nationalities usually, three in number, and is presided over by the senior consul. It administers no particular system of law; but in spite of this defect its superiority in extent of jurisdiction and prestige seems to give to it a greater hope of further development than any of the other Courts that are established in the foreign settlements in China.

# THE EUROPEAN CODES.

[*Contributed by* EDWARD JENKS, ESQ.]

ONLY a few words are necessary to explain the purport of the subjoined Table, the preparation of which, despite its apparent simplicity, has been attended with much difficulty and labour.

No document has been inserted in the Table unless, to the best of the compiler's belief, it is authoritative—*i.e.*, actually binding on the tribunals of the country to which it refers.

Only comprehensive enactments have been inserted—*i.e.*, such as profess to embrace and state completely all the law on some great organic branch of jurisprudence. Thus, lengthy enactments, such as negotiable instruments laws, bankruptcy laws, and inheritance laws, have been reluctantly excluded, as not sufficiently comprehensive in scope to be called "codes." Doubtless this decision has banished matter which is of the highest importance; but the line had to be drawn somewhere, and it seemed best to draw it there.

On the other hand, comprehensive statements of law have not been excluded merely because some of their provisions have been repealed. To have adopted such a course would have destroyed the chief value of the Table.

A few points of detail are worth mention. Codification is active in Hungary, and a Hungarian Civil Code may be confidently expected. Meanwhile, the Austrian Civil Code, though it was introduced into Hungary in 1849, is no longer in force there, having been repealed in 1867, except as to Transylvania and a few southern counties of Hungary proper, which formerly constituted the military frontier.

The Svod Zakonov of the Russian Empire is not, so far as I can discover, a "code" in the usual sense of the term, but rather a digest, which is brought up to date at fixed intervals. Inasmuch, however, as it is authoritative, I have thought it better to retain it.

The federal bond (Riks Akten) between Sweden and Norway is not, curiously, a "fundamental" law of either country, though the constitutions of each country are "fundamental." It is not unlikely that the bond between Austria and Hungary is of a similar character.

The present Penal Code of Switzerland is confined to matters falling

within the special cognisance of the federal authorities. But a referendum in 1898 brought the whole subject of civil and criminal law (excluding procedure) within the competence of the Federation; and an admirable draft of a general Criminal Code has already been published.

There are traces of a Portuguese Code of Civil Procedure; but I have not been able to secure an accurate account of it.

I regret that all my efforts have failed to obtain trustworthy information about the Greek codes.

In conclusion, I must be allowed to express my sincere thanks to the diplomatic and consular representatives in England of the various European States, and to His Majesty's consular representatives abroad, who in many cases have taken infinite pains to answer my enquiries, and to obtain for me accurate information. Even with their help, I am painfully conscious of the deficiencies of my work; without it I could not have ventured upon the task.

# EUROPEAN STATES.

| *Name of State.* | *itime Code.* | *Military or Naval Code.* | *Constitutional Code.* |
|---|---|---|---|
| AUSTRIA ... | | Militärstrafgesetz, 1855 | Staatsgrundgesetze, 1867 |
| HUNGARY ... | | | |
| BELGIUM ... | | | Constitution Belge, 1831 |
| DENMARK ... | | | Grundloven, 1849 |
| FRANCE ... ... | | | Lois organiques, 1875 |
| GERMAN EMPIRE | | Militärstrafgesetzbuch, 1873 | Verfassung des Deutschen Reichs, 1871 |
| ITALY ... ... | ber la Marina ıtile, 1877 | Codice penale militare marittimo, 1869<br>Codice Penale per l'esercito, 1870 | Statuto del Regno, 1848-70 |
| NETHERLANDS ... | | | Grondwet, 1887 |
| PORTUGAL ... | | | |
| RUSSIA ... ... | | | |
| SPAIN ... ... | | Código de Justicia Militar, 1890<br>Código Penal de la Marina de Guerra | Constitucion de la Monarquia Española, 1876 |
| SWEDEN... ... | 1891 | | Regeringsformen, 1809<br>Grundloven, 1814 — Riks Akten, 1815 |
| NORWAY ... | Sjöfarten, 1894 | | |
| SWITZERLAND ... | | Bundesgesetz über die Strafrechtspflege bei den eidgenossischen Truppen, 1851 | Bundesverfassungsgesetz, 1874 |

[*To face page* 72.

# THE TERMS OF SURRENDER.

[*Contributed by* Thomas Baty, Esq.]

For the last time the South African Republic and the Orange Free State have received official recognition in an official document. In the agreement signed on May 31st, the Boer leaders are described as the acting Governments of these States.. The agreement is not, as some expected it would be, a military convention by which the submission of rebels is accepted, but a treaty by the terms of which two nations surrender their independence.

**Terms of the Surrender.**—There is no means provided by which they can insist on the observance of these terms. They have ceased to exist: and if Britain finds that compliance with the strict intention of the agreement would be inconsistent with the welfare and development of the Empire, or if she is disposed to interpret them in a sense which is not that of her Dutch subjects, there is nothing (except regard for her good name) to prevent her from doing so. If this is kept in mind, it will be seen that, if the treaty is not an absolutely unconditional surrender, it comes extremely near it. Examining the terms of the document, it will be noted that the conquest of the Republics is to be implied from the surrender of their forces in the field. To have included among the articles an express *deditio* of themselves by the acting Governments would have thrown into too clear relief the fact (sufficiently obvious as it is) that they were recognised as such by the British. The leaders promise that their forces shall lay down their arms and recognise the King-Emperor as their lawful Sovereign: it is judiciously not stated when he became such. Their soldiers operating outside their territory will be readmitted to it on adhering to his Majesty. "Prisoners of war" outside *South Africa* will be allowed home on the same terms. The fact that this class of persons are styled "prisoners of war" is conclusive to show that they were not, up to the time of the treaty, subjects of Great Britain. If they had been, there would have been no colour for their indefinite detention as prisoners of war, and each of them would have been entitled to be brought to speedy trial as a rebel and a traitor. It may be convenient to accord to subjects the privileges of belligerents; but, unfortunately, it is not legal.

Britain undertakes to restore these enforced emigrants to their homes as and when practicable, and not to molest them, nor those who have surrendered, in person or property. This does not provide for the case

of individuals who are (1) not members of the surrendering forces, (2) nor of the forces in the field elsewhere, (3) nor prisoners outside South Africa. But, doubtless, a liberal interpretation will include all the subjects of the late States. The only difficulty is occasioned by the pointed way in which prisoners *within* South Africa seem to be excluded from benefit. It is hard to guess the purpose of this: and if the exclusion is held to apply to the inmates of the concentration camps, it will be a very important matter. The "property" of which Britain undertakes not to deprive these people must probably mean the property to which they may be at present entitled. The clause can hardly mean that confiscated property will be restored—its words are ". . . will not be deprived of their . . . property." But confiscating by proclamation introduces a difficulty. It is not easy to say whether property so confiscated will be considered as property of which the former owner will be considered to be "deprived" by its being retained; and there will doubtless be plenty of work for the repopulation commissions which are to settle the country. By the rules of warfare, apart from treaty, it is perfectly legitimate to confiscate the enemy's movables, and it is not "depriving" him of them to keep them afterwards, when the property has once passed. Immovables stand on a different footing: and as they could not be validly confiscated, except on the assumption of an effective annexation having long since taken place, it would seem that in retaining farms the conquerors would be really "depriving" their owners of property. And it seems admitted that there is no intention of the kind. The modern practice of refraining from confiscating movables (which is passing into a duty) is said by Wheaton to extend to cases "even of an absolute and unqualified conquest of the enemy's country."

As to the persons of the individuals in question, it is clear that they become British subjects, and, as such, it is not clear how their return to the Transvaal can be prevented, except by legislation. Equally plainly, those classes of persons who are not expressly included in the surrender and repatriation provisions, but who were subjects of the late States, must have become clothed with the British national character. So that Mr. Kruger, no less than General Botha, is now entitled to the protection of the King-Emperor, and is bound by the duties of his subjects. It might, perhaps, have been expressly provided that this transference of national character should only operate in the case of certain classes—*e.g.*, those who should individually accept the new *régime*. But that has not been done, and it is questionable whether it could have been done. If an old State had been left subsisting, it might well bargain to retain some of its former subjects. But a State which has absorbed the old one can hardly leave its subjects derelict.

**The Amnesty Clause.**—The clause usual in treaties of peace follows, which grants an amnesty for acts done in prosecution of the war, the exceptions being very properly limited to specified and determined cases.

Next comes what are really (for it would be absurd that Britain should seriously think of wreaking vengeance on the surrendered burghers) the most important clauses in favour of the Dutch. The Dutch language will be taught in public schools, where the parents of the children desire it, and it will be allowed in Courts of law when necessary. The clause does not guarantee that other school subjects will be taught in Dutch, nor that European immigration shall not swamp the desires of the Dutch parents. Consistently with this provision, a small English majority in a township might have the whole school instructed in English. It would be a strict compliance with it, even in a purely Dutch district, to teach Dutch for an hour a day. As to the use of the language in Courts "*when necessary for the better and more effectual administration of justice*," this need not cover more than the allowance of an interpreter, as in Wales. It is to be inferred that a generous reading of the clause will extend to advocates the privilege of pleading in Dutch, and to judges the obligation of understanding it, in all districts where there is a considerable Boer population. Rifles, when required for protection, will be licensed.

Clause 7 contains a curious sliding scale of governmental institutions. "Military administration" is to be replaced by "civil government"; and that, in its turn, is to be reinforced by "representative institutions," which are, however, not to constitute, but to "lead up to" self-government. This is, of course, the self-government of a colony, which is limited by Imperial convenience.

**The General Debt: Taking over.**—The advance of a certain sum to cover the cost of repatriation had been anticipated. In addition, receipts by commanders for value and a particular class of notes of the South African Republic will be considered as war losses, and recouped out of the sum in question. No provision is made as to the assumption by Britain of the general debt of the Republic. On principle, it ought to be taken over; and the fact that it may have been incurred in providing armaments should make no difference. Such preparations form a large part of the expenditure of every State. It is a corollary from the provisions for repopulation, and a necessary condition of the success of the process, that no special tax is to be levied on land for the expenses of the war. "Landed property" is the phrase; but it seems that the Secretary for the Colonies does not think that it includes the produce of land, since he regards it as leaving it open to tax the mines. Possibly the Boers will not object.

**The War and the Law of Contraband.**—The war which has now closed has not been devoid of interest to the publicist. It has raised at least one point of International Law of first-class importance. The question of contraband goods in transit to a neutral port gave occasion for some extremely plain speaking, and a Departmental Commission is at present studying the question. Their skilled advisers will, we may hope, be imbued with the spirit which made this country refuse to recognise the new rules of the

armed neutrality as law simply because they commended themselves to Continental theorists. Yet over-confidence would not be justified. To the regret of those who think that the welfare of the world is forwarded by safeguarding the certainty of the rules of the law of nations, Great Britain showed herself disposed two years ago to abandon the attitude she took up in this matter so strongly during the American Civil War, and to fall in with modern Continental theories of subjective intention which would cause endless embarrassment and distress to neutrals. Her old laws were good enough for her in the great days of Scott, and Grant, and Pitt. Emden was a kind of Lorenço Marquez, easy of enemy's access ; and yet she disdained to treat it as a terminus for contraband. To those who are fond of denying the force and authority of International Law, the undisturbed voyage of the *Gelderland* offers a singularly instructive spectacle. The warship of a small Power, she offered a safe asylum and conveyance to Europe to the arch-enemy of the leading maritime nation on his avowed mission to gain support for his country at the courts of Berlin and Petersburg and in the *salons* of Paris.

The right of our late enemies to sue in English Courts will be revived, but the partnerships determined by the war will remain dissolved. It seems a curious question whether the purported annexations of two years ago conferred on the Boers the right to sue in the Courts of this country. It is the fashion with modern tribunals to accept the certificate of the Foreign Office that a country is or is not independent as conclusive. They do not think themselves warranted in enquiring whether the executive definition of independence amounts to real independence or not. Much less would they enquire whether a governmental proclamation of annexation amounted to a valid annexation of which they were bound to take cognisance. It is a somewhat startling instance of judicial dependence on the executive ; but it seems a necessary deduction from the *Johor* and *Spilsbury* cases.

# PRESUMPTION OF DEATH UNDER THE GERMAN CODE.

[*Contributed by* JAMES S. HENDERSON, ESQ.]

**The Rule of English Law.**—In England the general rule as to presumption of death is thus stated in Stephen's *Digest of the Law of Evidence* : "A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death." But while this is the general rule, the Court may presume a person's death without regard to the time that may have elapsed since his disappearance (*In the goods of Matthews*, 1898, P. 17). The absent person having been judicially presumed to have died, his property is distributed on the strength of that finding among those who would take it if it were actually proved that he was dead. But suppose that in point of fact he still lives and returns to claim his own, what then? If his rights have not been barred by the Statute of Limitations, he is entitled to restitution of his property. But what if he left a wife, and she, as did the wife of Enoch Arden, has remarried? English law deals with this awkward situation with brutal simplicity. The second marriage is treated as a mere nullity and children born of it are illegitimate. No regard is had to the *bona fides* of the parties ; the absent husband in all probability has been guilty of what may be called gross neglect in having deserted his wife for long years, but all this will avail the poor woman nothing ; no Statute of Limitation runs in her favour save as exempting her from criminal liability in respect of having committed bigamy. This is the sole concession made to her by the law of England.

**The Law of Scotland.**—In Scotland the subject is to a large extent governed by Statute. In 1881 the Presumption of Life Limitation (Scotland) Act was passed, but that enactment has been repealed and replaced by the Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict., c. 29). By s. 3 of this Act it is provided that where a person has disappeared and has not been heard of for seven years or upwards the Court may on a petition presented by any person entitled to any property, real or personal (except

under a policy of insurance on the life of the absent person; as to this the Act has no operation: see s. 11), on the death of such absent person, and after such enquiry by advertisement, or otherwise, find that the absent person died on some specified date within seven years, or where no evidence on that point is obtainable, find that he shall be presumed to have died exactly seven years after the date on which he was last known to be alive; and on such finding the petitioner may make up a title to, and enter into the possession and enjoyment of, the property of the absent person as if he had actually died when he is presumed to have done so. This section does not, however, entitle any person to the intestate movable succession of the absent person, if the latter was not a domiciled Scotsman at the date when he is held to have died. It is, of course, foreseen that the presumed dead man may not in fact be dead, and that he may return and claim his property; accordingly ss. 6 and 7 make provision for such a contingency. Under these sections he (the real owner) is entitled to restitution of his property or its value, free from any encumbrances not attaching to it at the date of the decree of the Court, provided he makes his claim within thirteen years from the time when the title of the petitioner under s. 3 accrued, but he is not entitled to any of the income which has accrued prior to notice of his claim, and he is bound to allow for any meliorations made upon the estate by the person called upon to make restitution. This Statute, it will be observed, deals with the case of a person who has disappeared for at least seven years; other cases still have to be dealt with under the common law and facts shown to warrant the Court holding that the absent person is dead. It will further be noticed that the Act does not touch the question of the absent person's domestic relations, but is concerned solely with regulating the disposition of his property. If he has left a wife and she has entered into a second marriage, believing the absent husband to be dead, such second marriage, as is the case in England, is void, where it appears that the first husband was alive at the date of its celebration, but the children born of it are deemed legitimate, provided their parents, or, according to Lord Fraser, one of them, *bona fide* believed that the husband of the first marriage was dead (see Fraser, *Husband and Wife*, vol. i. pp. 151 *et seq.*; *Parent and Child*, 2nd ed. pp. 22 *et seq.*). In thus humanely, although somewhat illogically, recognising the legitimacy of the children of a marriage which it declares to be void, the law of Scotland prefers the more generous rule of the Canon Law to the harsher provision of the law of England.

**Provisions of the German Code.**—Now, turning to the German Code, we find that it contains elaborate and very precise provisions on this whole subject. The rules as to presumption of death are contained in §§ 14 to 20. By § 14, a person may be declared to be dead if for ten years no information is forthcoming as to his continued existence, but such declaration cannot be made before the end of the year in which the missing person would have completed his thirty-first year. If, however, the absent person

would have completed his seventieth year, the declaration of his death may be made if five years have elapsed since he was last heard of. These periods of ten and five years respectively begin to run from the end of the last year in which the absent person is shown to have been alive. The three following paragraphs make provision for certain special cases.

**Missing in Case of War or Lost Vessel.**—§ 15 enacts that a person who has taken part in, and been missed during, a war, and of whom no information has since been obtained, may be declared to be dead, if three years have elapsed since the date of the treaty of peace between the belligerents, or, if no treaty has been concluded, where the like period has elapsed since the end of the year in which hostilities terminated; by § 16 it is provided that if the person who has disappeared was on a ship which has been wrecked, and no information has since been obtained regarding him, he may be declared to be dead after the lapse of one year from the loss of the vessel. The loss of the vessel is presumed if it has not reached its port of destination, or, if it had no fixed destination, has not returned, after the lapse of one year in the case of voyages in the Baltic, two years in the case of voyages in other European waters, including the whole of the Mediterranean, the Black Sea, and the Sea of Azov, and three years in the case of voyages in extra-European waters—these periods being reckoned from the commencement of the particular voyage. If, however, information concerning the vessel has been received, the requisite period which must have elapsed as a condition to the pronouncement of the declaration of death begins to run from the time when the vessel left the port or place at which she was last heard of. By § 17 a person who, under other circumstances than those specified in §§ 15 and 16, has been exposed to great danger, and since then has been missing, can be declared to be dead if, since the occurrence through which his life was imperilled, three years have elapsed. The particular time at which the missing person is presumed to have died is declared by the decree, and is ascertained according to the rules laid down in § 18, which prescribe that so far as the date is not otherwise fixed, the death is to be taken to have occurred

(1) In cases falling within § 14, when the declaration of death is permissible—*i.e.*, immediately on the expiration of the periods of ten or five years therein mentioned;

(2) In cases falling within § 15, at the time when peace was concluded or at the end of the year in which the war terminated;

(3) In cases falling within § 16, at the time when the vessel was wrecked or when it is presumed to have been lost;

(4) In cases falling within § 17, at the time when the occurrence which imperilled the life of the person took place.

The time is arrived at still more definitely by the additional clause to the same paragraph (18), which declares that if the death is ascertained to have taken place on a particular day, without further details, it is to be taken

to have occurred at the end of that day. § 20 provides for the case of several persons perishing in the same disaster; it declares that in such a case all are to be taken to have died at the same moment.

**Declaration of Death where Person Living: Property.**—Having thus noted the rules prescribed by the Code for having it judicially declared that a missing person is dead, we have next to enquire how it deals with the case of a person so declared to be dead, but who in fact is still alive. As to his property, the Code allows him to demand restitution from the person in whose possession it is, on making compensation to such person for all sums expended thereon by him so far as these are not recouped by the property itself; allowance must also be made for sums expended in freeing the property from encumbrances. If the property cannot be restored *in specie*, its value is to be paid (§ 2031). A claim for restitution is barred after the lapse of one year from the time when the person entitled to make it first has knowledge of the judgment declaring him to be dead (*ibid.*).

**Domestic Relations: Bigamous Marriage.**—Then as to his domestic relations: the Code (§ 1348) recognises the validity of a marriage contracted by a party to a previous marriage whose spouse has disappeared and been judicially declared to be dead, except where *both* parties to the second marriage were aware at the time of contracting it that the missing spouse of the first marriage was still alive. The contracting of the second marriage operates the dissolution of the first, and this is so although the declaration of death is subsequently set aside. If, however, steps are taken before a second marriage has been contracted to impeach the decree declaring the absent person to be dead, the other spouse cannot validly contract marriage until the question has been disposed of, unless, indeed, such proceedings are only commenced ten years after the declaration of death (§ 1349). But while the law will recognise the validity of a second marriage in the circumstances assumed, if acquiesced in by the parties to it, it allows them under the limitations prescribed by § 1350 the option of having it dissolved should it appear that the spouse declared to be dead is still alive. That paragraph provides as follows: "If the spouse declared to be dead still lives, either party to the new marriage may impeach it unless he (or she) knew at the time of entering into it that the absent spouse was still alive. Proceedings to annul the new marriage can be instituted only within six months from the time when the party instituting them hears of the continued existence of the person declared to be dead. Such proceedings cannot be brought if the party entitled to attack the second marriage affirms it after becoming aware that the absent spouse is still alive, or if the marriage has been dissolved by the death of either party to it." If the new marriage is attacked by the spouse of the former marriage, he (or she) must grant maintenance to the other party, unless the latter knew at the time of contracting the second marriage that the absent spouse was then alive (§ 1351). The children born of a second marriage entered into by a person previously married

who *bona fide* but erroneously believed that the other spouse of the previous marriage is dead are deemed to be legitimate (§ 1699).

**Policy of German Law.**—From an examination of the foregoing provisions it will be seen that both as regards personal relations and property the German law differs in material respects from our own. It recognises the validity of what we term "bigamous marriages," provided they are contracted in good faith, at the same time allowing either party to such a marriage, unless estopped by knowledge, to take steps to have it annulled within a limited time if he or she so desires; but taking care to provide that the children born of such a marriage are to be considered legitimate even if the marriage itself is set aside. And as regards property, the Code gives the returning Enoch Arden a year from the time when he learns that he has been judicially pronounced dead within which to reclaim his property. At first sight it seems as if the framers of the Code were concerned more about preserving the property rather than the domestic rights of the absent person, for no power is given to him to challenge a new marriage contracted by the spouse he left behind him. But a little reflection will explain the apparent anomaly. Property can be restored, or its value repaid, without disturbing the domestic relations of the persons called upon to make restitution, but a marriage, with its manifold new relations cannot be undone without inflicting grievous injury on a whole circle of innocent people; and accordingly the power to inflict this injury is denied to the returning spouse, who by his absence and silence has contributed to bring about the altered state of things. In the terminology of our own law, he has estopped himself from complaining of the second marriage.

# STRAITS SETTLEMENTS: MALACCA LANDS.

[*Contributed by the* Hon. W. R. Collyer, *Attorney-General, Straits Settlements.*]

An Ordinance has lately been passed in the Straits Settlements with the short title of "The Malacca Customary Land Transfer Ordinance, 1901," which deserves a passing notice, because it is one of the few enactments of that colony dealing with and confirming institutions which had their root in a state of things which existed long before the ascendancy or even the arrival of the English.

**Legislation and the "Lex loci" in the Straits Settlements.**—Legislation in the Straits Settlements has followed the lines of British legislation as closely, probably, as in any colony. The settlements founded at Penang by Captain Light in 1786, and at Singapore by Sir Stamford Raffles in 1819, succeeded to no local system of government sufficiently organised to attract the attention or to merit the consideration of the newcomers. An heterogeneous foreign population joined the settlers and shared their fortunes. There was no setting up of an alien domination over an organised indigenous population, and the *lex loci*, such as it was, never exercised enough influence over the inhabitants at large to call for the attention and consideration of the governing body, except so far as a regard for local custom may be indicated in the general direction given by the letters patent constituting the Supreme Court of Judicature, that due attention should be had to the several religions and manners and usages of the "native inhabitants" (which appears, by the way, to be an early instance of the use of the word "native" as equivalent to "non-European").

**Malacca: Its Customary Land Tenure.**—The settlement of Malacca had an entirely different history. Founded by Albuquerque in 1511, and taken by the Dutch from the Portuguese in 1641, it had "enjoyed" European government for more than three hundred years when finally ceded by the Dutch to Great Britain in 1824. It might have been expected that, as in Ceylon and elsewhere, the Roman-Dutch law would have continued in operation after the cession. But probably Malacca was not considered of sufficient importance for the adoption of a system of law different from that in force in the other settlements, and no doubt the adoption of Roman-

Dutch law in one settlement out of three, and that the least important, would have been far from convenient.

There was, however, an important exception to the complete adoption of British law in Malacca. The Malacca customary land tenure was retained, though in the other settlements the law of real property, as modified by local enactments, prevailed from the first.

The Malacca customary tenure is, in fact, the Mohammedan land tenure as received by the Malays, introduced, doubtless, by Arab influence, as part of the Arab civilisation and religion. Under it the land, for the purpose of cultivation, is held from the Crown (or from some other over-lord, the Crown's grantee), subject to the payment of tithe, the right of the lord to minerals, and the right of resumption for public purposes, or in case of non-cultivation for a period of three years. It is a hereditary right to occupy and cultivate the surface of the land under a superior lord who is the actual owner of the soil subject to the rights of the cultivator.

**Dutch and British Influences.**—Under the Dutch, the customary tenure of Malacca appears to have remained untouched, and was probably well understood.

Several eminent Dutchmen appear to have acquired considerable landed property in the settlement, but they seem to have held their lands as over-lords, while the native occupiers remained in possession, paying their tithes and owing their duties to the private proprietor instead of the State. Under British government the principle of respecting local tenures of land has always been observed; and Malacca formed no exception to this rule. But whether from an imperfect understanding of the custom or from other causes, there is no doubt that the tenure of land in Malacca presented considerable difficulties, to obviate which an Ordinance was passed in 1886 "to declare and amend the law relating to customary rights in land in Malacca."

Two points may be observed with regard to this tenure of land: first, it is exceedingly well adapted for small holdings by peasant occupiers (all the State land in the Ottoman Empire is held under it, and as a system it leaves little to be desired); secondly, being *par excellence* a poor man's tenure, the British system of conveyancing, however admirable, is quite inapplicable to it.

**Land Registration.**—There has always been a system of registration for the Malacca lands; but such registration has not conferred an indefeasible title, and though the operation of the Conveyancing and Law of Property Ordinance of 1886 was expressly excluded in 1890 from affecting the customary lands in Malacca, yet British conveyancing has played a large part in the operation of every kind of transfer of such lands. The results, as might be expected among a population of very ignorant Malay peasants, have been often far from good—sometimes far from what the parties desired.

**The Malacca Customary Lands Transfer Ordinance, 1901.**—The object of the present Ordinance is to legalise the existing system of registration and to make title entirely dependent on registration, the primary evidence of title being the registration itself, while each occupier has an extract from the register as his document of title. Transfers will be made at the Land Office in the presence of the parties or their agents, and no transfer will be valid unless made in accordance with the provisions of the Ordinance. Conveyances and mortgage deeds will no longer be necessary or even of any value, and it is hoped that the simplification of the method of transfer will be a real boon to the peasant occupier. The system is one which he understands and every precaution has been taken to prevent fraud.

The position of the customary holder will be very like that of the peasant occupier (not "proprietor"—the "proprietor" is the Sultan) in the Ottoman Empire. For each little patch of ground on which he grows his barley, sesame, or cotton, the Turkish peasant has a separate certificate, or *kotchan*, equivalent to the Malacca extract from the register. He in general cannot read, and if called upon to prove his title to one of his plots, he hands his whole bundle of *kotchans* to the Court to choose from. In the Turkish Empire these *kotchans* are most miserable documents to look at—soft and ragged, and ready to fall to pieces. But the quality of paper is not the consequence of economy, but an intentional precaution against fraud, for no one can commit forgery by altering the writing on such paper. Probably, however, this is a precaution which the Malacca Land Office will not think necessary.

# NOTES.

**British Commercial Travellers in Germany.**—"The municipal law of Germany," writes Mr. Julius Hirschfeld, "does not extend to foreigners an inherent right to carry on business in travelling about that country. The Act (*Gewerbe-Ordnung*) relating to such trading provides: 'Foreigners may be permitted to exercise their trade in travelling. The Federal Council is authorised to issue such orders as are requisite for the purpose' (Par. 56 [*d*]). The order regulating the conditions under which they may ply their trade is dated November 27th, 1896, and distinguishes between three categories of foreign travelling traders, viz :—

(1) The subjects of such States with which their position has been agreed upon by a special treaty ;

(2) The subjects of such States with which a general commercial treaty containing the most favoured nation clause subsists ;

(3) The subjects of any other nation with which no such convention is in force.

"Travellers of the first class are, in conformity with those treaties, substantially placed on the same footing as the natives, with special facilities as to general trading licences ; those of the second class do not enjoy quite the same advantages, but are entitled to take out a licence as foreign commercial travellers available for the whole Empire (subject to local taxation) ; traders of the third class, however, are in an altogether different position in so far as in their licences they are not characterised as commercial travellers but as itinerant dealers, and are thus placed on the same footing as hawkers and pedlars. Their licence is, as a rule, only available for the administrative district for which it is issued, or extended to by the competent authorities, and must be renewed at least once a year. Licensees have to pay taxes in every particular State, and trading without a licence is punishable with a fine or imprisonment.

"Since the Commercial Treaty between Great Britain and the Zollverein came, at the instance of the British Government, to an end in July, 1898, the British commercial travellers would have been relegated to the last-named category. The Federal Council, however, decided in June, 1898, that the subjects and products of the United Kingdom and its colonies (except Canada) and possessions should, until further notice, be granted the same advantages as those of the most favoured nation."

**The late Professor Thayer and "Obiter Dicta."**—The cause of legal education has sustained a severe loss in the death of Professor Thayer, of Harvard. In illustration of his methods an old pupil of his, writing in the *Columbia Law Review*, says: "The repetition of a single question which at the time seemed hopelessly tedious will never be forgotten. Scarcely a case was stated for months but what the first question asked was: 'How did that case come up?' He drilled into the minds of the students, as perhaps no other instructor has ever done, the absolute necessity of examining a case, not from the point of view of what was *said* by the judge, but from the point of exactly what questions really were presented for legal decision. The precise points presented by the matter of an appeal were invariably determined before the opinion of the Court was at all considered. Dicta, however interesting as legal discussion, were carefully sifted out and plainly labelled. The importance of such a treatment of authorities was so emphasised that it could not be forgotten, and the good effects of that lesson, so well taught, will be appreciated by the students who sat under Professor Thayer so long as their practice of the law continues." Professor Thayer was, in the words of Holmes C.J., "an example of what we need to see exemplified as often as may be—unadvertised quiet production of the first rate."

**Legal Education and Law Reporting.**—Professor Jethro Brown, in some recent articles in the *Law Quarterly Review* on "The Purpose and Methods of a Law School," dwells on the importance of teaching by cases and its value in impressing a principle of law indelibly on the mind. But why is it that neither he nor others who have touched this method of legal education draw the natural corollary, and emphasise the importance of law reporting as part of the training of the law student?—law reporting, that is, of a thorough-going kind. To begin with, the student gains in this way an acquaintance with the procedure of the Court, with the different *rôles* in the legal drama played by judge, counsel, solicitors, witnesses, and jury, which is not to be got from text-books or lectures, or even the *fabula acta* of the moot. He learns how cases are really tried. Then, in fashioning his report, the student has to sift the material facts from those which are immaterial; to state these facts in a clear and consecutive narrative, so as to disclose a cause, or alleged cause, of action. He has to examine for himself the authorities cited on each side, to weigh and consider their significance, and to range each under its proper head of argument. Finally, he has to put the judgment, if it is an oral one, into the best logical and literary shape he can. The educational value of all this can hardly be overrated. In Lord Kenyon's day the students, as Lord Campbell tells us, had their box in Court close to the Bench, and Lord Kenyon would often come and explain the record to them; yet in modern methods even this modicum of Court training is neglected.

**The Liability of Telegraph Companies in England and America.**—A

telegraph company is not liable by English law to the person to whom a telegram is sent for mistake in or misdelivery of the message, the theory being that there is no privity of contract, and any misrepresentation—looking at it from that point of view—is an innocent one only, for which no action lies. The inconvenience of this state of the law is forcibly illustrated in the leading case—*Dickson* v. *Reuter's Telegram Company* (3 C.P.D. 1; 47 L.J. C.P. 1), where the misdelivery of a telegram led to the plaintiff sending a consignment of barley which had never been ordered from Valparaiso to Liverpool, and incurring heavy loss in consequence. A medium of communication so much used by business men as the telegraph or cable ought to be as free as possible from error. American lawyers have realised this; and in most of the States Acts have been passed to meet the difficulty. The effect of these Acts is that telegraph companies are made quasi-public servants, and are held liable for a high degree of diligence and a strict discharge of duty. The responsibility of the company is elevated above the plane of privity of contract, and is rested on the public duty which the telegraph company owes to the receiver as well as the sender. In some States the obligation of telegraph companies is still further extended; so that a person, beneficially interested in the message, though neither the sender nor the receiver, may maintain a suit for damages for errors or for failure to deliver. Even in those States where there is no statutory provision imposing any duty to the public, telegraph companies are held to be engaged in a public employment, and to be under an obligation to receiver as well as sender to use due diligence in conducting that business. This is an instance of how law needs to be constantly adjusted to the changing conditions of modern life.

**The New Russian Criminal Code.**—Referring to the new Criminal Code in preparation in Russia, a well-informed correspondent writes: "The draft code upon which the Council of State is now engaged has been drawn up by an expert committee of jurists. The criminal law at present in force is the old Code of 1845 supplemented by various later enactments, and is no longer suited to the requirements of modern Russian life. The committee which is responsible for the new Code has devoted some fifteen years to its task. The main feature of the revised Code is that it does not seek, as is the case with the one at present in force, to define every separate crime which may be punished, but relies upon broad general definitions. Instead of the 1711 paragraphs of which the old Code consisted, the revised one contains about a third of that number, in spite of the fact that it deals with a number of crimes which were unknown, or practically unknown, in 1845, such as blackmailing, strikes, and many others. It is interesting to note that strikes become criminal under the new Code when they are directed against the Government or when they lead to injuries to persons or damage to property. The old 'staircase of punishments,' to employ a Russian phrase, finds no place in the new Code. According to the old law the lowest punishment was a 'reprimand,'

and all other punishments were reckoned as equivalent to so many reprimands. The penal system was very complex, and included punishments of many kinds and grades, ranging from the reprimand to transportation and capital punishment. In the new Code all this is done away with, and imprisonment of various degrees of severity becomes practically the only punishment. The committee even recommends the entire abolition of the death penalty. The new Code endeavours to deal in a comprehensive manner with the difficult question of the estimation of the extent to which it is possible to hold a person responsible for acts committed in particular circumstances or in particular states of mind. This part of the Code, which includes the definition of the principles of the responsibility of minors, is the work of the well-known jurist, Professor Tagantzeff, the President of the Department of Criminal Cassation."

**Some Divorce Statistics.**—Dr. Friedrich Prinzing in the *Zeitschrift für Socialwissenschaft* gives some interesting divorce statistics. The number of divorces in different countries depends, of course, largely on creeds and laws as well as on national temperament and morals; but, on the whole, the proportion of divorces to the sum total of married life is remarkably small among the European nations, ranging between 0·42 and 0·11 per thousand married couples. In Japan divorce is much more common, and in the United States the negroes largely swell the number. Everywhere it seems, however, on the increase. A significant feature in Germany is the growing number of divorces granted on the ground of mutual agreement. For the five years ending 1897 there were in Berlin alone 173, 302, 324, 416, 457. Children, as might be expected, are the best preventive of voluntary divorce. In Berlin in 1897-8 in one thousand divorces the surviving children were as follows: no children, 54 per cent.; one child, 21·3 per cent.; two children, 13·8 per cent.; three children, 6 per cent.; four children, 2·6 per cent.; five children, 1·1 per cent.; six children, 1 per cent.—a strong argument for large families. Early marriages among the poor cause much misery in our large towns; they are also, to judge from Dr. Prinzing's figures, the least enduring unions. The vast proportion of divorces both of men and women are among those who married under twenty years of age. As marriage has grown later, the ratio of divorces steadily decreases, according to his statistics. Romance must reckon with this fact as best it can. For those about to "venture" it may be well to know that, according to Dr. Prinzing's figures, the most critical time for matrimonial fortunes—when divorces rule highest—is the sixth or seventh year after marriage.

**State Homes for Neglected and Delinquent Children.**—In a recent number of this journal Dr. Fritz Rathenau gave an interesting account of the new German method of dealing with children by placing them in families. The same tendency in "child-saving work" is exhibiting itself in the United States. Laws have lately been passed (see *Review of United States Legislation for* 1901: New York State Library) by Illinois, Pennsylvania, and Wisconsin to

regulate the treatment of neglected and delinquent children—for a distinction is drawn between the two classes. Under these Acts Courts for juveniles are established and a system of records of them is kept; a right of petition to the Courts is given to resident citizens in the interests of such children; and probation officers are appointed. The Acts forbid the commitment to gaol of young children; they are to be placed, in all cases where it can be done, in an approved family home and to become members of the family by a quasi-legal adoption; and the Acts expressly declare that the care, custody, and discipline of a child in such a home are to approximate as nearly as may be to what would be given by the child's parents. Parole officers are appointed for juvenile reformatories—officers, that is to say, to inspect the homes of children "paroled" from such institutions, to see that they are suitable—and local boards are also provided to visit all institutions receiving children under the law.

**Youth and Liquor in Canada.**—More and more the legislatures of the world are recognising that in children is the *spes gentis*, the best promise of social regeneration for each State. Not that one any longer imagines the youthful mind to be the sheet of white paper postulated by Locke, on which anything may be written. Heredity has already written there in its own invisible ink, to come out in due time. But much can be done: better the environment, shield from temptation—the temptation, for instance, of strong drink. We have done something lately in England to prevent children being familiarised with the public-house or getting a taste for drink by being sent for beer; and Canadian law, with the same benevolent intention, has enacted penalties against a publican who sells intoxicating liquor to any one under eighteen years of age. The effect of this probibition came in question in the recent case of *Perkins* v. *Braies* (20 *Rapports Judiciaires de Québec*, 536). A wedding party from the country adjourned after the ceremony to a hotel and ordered liquor to be served in the hotel parlour for the guests, among whom was a boy of fourteen. When the refreshments were brought the hotel-keeper declined to serve the boy; whereupon his aunt, who was present with two of his uncles and a grand-uncle, took the glass of wine from the tray and gave it to the boy, who drank it. The Court held that this did not make the hotel-keeper liable to a penalty. There is nothing in the law, it said, which forbids persons under eighteen years of age to use intoxicating liquor. The law is merely intended to make it difficult for them to obtain it and to prevent the seller from taking advantage of their youth and inexperience by selling them liquor. The boy was at the hotel under the care or tutelage of his relatives. It may have been injudicious on their part to give him wine, but the hotel-keeper was not to blame.

**Sovereignty and Leases of Territory.**—In a brochure entitled "Comment nous gouvernerons le Congo?" a Belgian jurist of eminence discusses the question which has become important by reason of arrangements made

in Africa and China, "What is the effect of the lease of territories by one State to another?" The arrangement between Great Britain and the Congo State of May 12th, 1894, so far as it still subsists, is a case in point. Of the effect of this novelty Dr. Speyer naturally speaks with hesitation. But, reasoning from analogy, he conceives that the lease confers on the lessee all the rights of sovereignty, subject to the restriction that "il ne peut consentir aucune limitation définitive à ces droit, de manière à ne pas porter atteinte aux droits du propriétaire."

**Tribal Law.**—A model of what a study of the laws and manners and customs of a primitive people should be is to be found in Ober-Lieutenant Merker's account of the *Rechtsverhältnisse und Sitten der Wadschagga*, printed in Petermann's *Mitteilungen aus Justus Perthes' Geographischer Anstalt.* It just answers the questions which a lawyer would put. It will be noted that this tribe, which practises polygamy, does not recognise marriage with a wife's sister, if the wife is not deceased. A widow with one or more sons living may not marry. The strangest feature of the law is that younger sisters may not marry without the permission of their elder sisters, if the latter are unmarried—a law which would find favour in some civilised communities.

In a recent number of the *Journal of the African Society* is an account of "The Laws and Customs of the Fjort or Boirli Family, Kingdom of Loango." Although the native language has no words for property, wills are recognised. A sale is valid when it is completed in the presence of witnesses, and the seller has blessed the transaction. "He lifts his hands to his armpits, and then throws them out towards the buyer, and breathes or blows on the thing sold." There is a check on prolonging proceedings at a trial or unduly spinning out the palaver. "Each day that the palaver lasts, each party pays the judge one large calabash of palm oil." Market law is recognised; "on the creation of a market, a gun is buried, and an agreement made that no arms of any kind may be brought there"—a ceremony which, firearms apart, recalls European mediæval usages as to market law.

**The late Sir H. Jenkyns on "British Rule and Jurisdiction."**—"We must not forget," said Chief Justice Marshall, "that it is a Constitution we are expounding." The late Sir Henry Jenkyns did not forget it; and this fact, coupled with his knowledge of legislative and administrative machinery, gives a peculiar value to his posthumous work, *British Rule and Jurisdiction Beyond the Seas*, edited by Sir Courtenay Ilbert, who adds an interesting biographical sketch of the author. It is no small matter merely to have the precise definitions which we get in this book, for few subjects are surrounded with more nebulousness. A "sphere of influence," for instance, is "a portion of a non-Christian or uncivilised country which is the subject of diplomatic arrangements between European States, but has not yet developed into a protectorate." A British "protectorate" is "a country which is not within the British dominions, but as regards its foreign relations is under the exclusive control of the King, so that

its Government cannot hold direct communication with any other foreign Power, nor a foreign Power with that Government." Extra-territorial jurisdiction, consular jurisdiction, the position and powers of colonial governors, the relation of Crown colonies to the Home Government, are all matters—to name only a few—on which the inheritors of an Empire like ours sadly need illumination. The chapter on "Self-Governing Colonies," which was pre-Australian Commonwealth, has been brought up to date by Mr. J. A. Simon.

**Parliament and the Channel Islands.**—Few persons are probably aware that the Channel Islands—the sole remaining fragments of the Dukedom of Normandy—claim to have conquered England, and this claim is so far allowed that it is regarded as doubtful whether an Act of the Imperial Parliament is of its own force binding law there. This is how, according to Sir Henry Jenkyns's explanation, the difficulty is got over in practice. When an Act is intended to apply to these islands, a section is inserted authorising the King in Council to issue an Order for the application of the Act to these islands and requiring the registration of that Order in the islands, and the Order in Council is made by the King and registered by the States accordingly.

**Company Law in Canada.**—Canada has just passed a new Companies Act consolidating the law of joint stock companies in the Dominion. The first thing which strikes us is the number of matters, usually left in England to the articles, which are made the subject of statutory enactment. To take an instance: under the new Companies Act, 1900, it is left to the shareholders to fix the minimum subscription on which the directors may go to allotment and commence business. Under the new Canadian Act the amount is fixed by the Act: a company is not to commence its operations or incur any liability before 10 per cent of its authorised capital has been subscribed and paid for. In England, again, the minimum number of directors is always a matter for the articles. In Canada it is fixed by the Act. Looking at the way in which in England novel articles are put upon shareholders by promoters, there is a great deal to be said for the Canadian method. A new departure in the Canadian Act is to relieve persons who hold stock merely as trustees or executors from personal liability, and make the estate only liable. The hardship of trustees' personal liability under English law was pathetically illustrated in the Glasgow Bank catastrophe; but the conclusiveness of the share register was, and is, a fundamental part of the policy of our Legislature in conceding the privilege of limited liability. Another provision rather startling to English lawyers is allowing directors of a company to reduce the capital stock. The liability of shareholders to creditors of the company at the date of the reduction, is, it is true, preserved; but a liability to refund is "a bird in the bush," hardly as good as the fund itself. With regard to dividends, the Canadian Act uses the somewhat enigmatical words, "No dividend shall be declared which will impair the

capital of the company." This was probably inspired by the English decisions: *Lee* v. *Neuchatel Company* 41 Ch.D. 1; *Verner* v. *General Trust*, 1894, 2 Ch. 239. In lieu of the preferential payment out of assets given to clerks and servants by English law on a winding up, the Canadian Act makes the directors jointly and severally liable for six months' wages. Comparison on points like these is mutually instructive; but how did the framers of the Canadian Act come to put in a replica of s. 38 of our Companies Act, 1867—the disclosure of contracts section—which has given our Courts so much trouble, and is now abandoned?

**The International Regulation of Balloons.**—One of the subjects to be discussed at the next meeting of the Institut de Droit International is the regulation of ballooning (*le régime juridique des aérostats*). It sounds superfluous to announce the principle "*L'air est libre*," as M. Fauchille does in his *projet de règlement*. But he contemplates freedom which is very much like servitude. The zone of protection or isolation which may not be entered, on pain of incurring severe penalties, is large; the aëronaut even in time of peace must not penetrate "à moins de 1,500 mètres au-dessus de toutes les parties du territoire continental des États et à moins de 1,500 mètres à compter de leur côtes ou des ouvrages de defense installés sur leur rivage." It is interesting to note the attempt which is made in the *projet* to apply to balloons the well-known distinctions between private vessels and ships of war.

**Power of a "Vakil" in India to Compromise.**—By English law counsel has authority over the action, the mode of conducting it and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, assenting to verdict; and this authority includes the consenting to a compromise of any matter within the action, unless counsel has received positive instructions to the contrary. In India it would seem from the recent judgment of Mr. Justice Banerjee in *Bhut Nath Sircar* v *Ram Lall Sircar* (6 *Calcutta Weekly Notes*, 82) that the appointment of counsel or a *vakil* does not by itself carry an implied authority to compromise; there must be an express authority for this purpose. The appointment does authorise a *vakil* to make binding admissions before the Court in the course of conducting the case, but the learned judge draws a distinction between making admissions and entering into compromises. An admission made on any disputed point means only that the counsel or *vakil* making it declines to argue an untenable or an immaterial point; a compromise means a good deal more: it involves the giving up by each party, in consideration of a compensating advantage, of what, though tenable, may not be of so much value to him as what he secures in return, and "that," says the judge, "is a matter into the consideration of which a counsel or a *vakil* may not be quite competent to enter." An admission, moreover, leaves the ultimate decision of the case in the hands of the Court; a compromise really takes the case out of

the hands of the Court, so far as the determination of any question of law or fact is concerned, and requires the Court merely to record the agreement arrived at by the parties. Such, at least, is Mr. Justice Banerjee's view. Whatever may be the case in India, this is not so in England; the Court no doubt in ninety-nine cases out of a hundred assents to the compromise, rightly deeming the parties the best judges of their own affairs, but the Court retains its control of the action all the same.

**An American View of Bankruptcy.**—"In America," says Mr. Olmstead, writing in the *Harvard Law Review* for June, "bankruptcy has come unfortunately to be regarded as a sort of poor debtor law, as a species of clearing house for the liquidation of debt, or, as some have expressed it, a 'Hebrew jubilee,' whereby the people at intermittent periods receive emancipation from their debts, are rehabilitated, and the 'dead wood' of the community is thereby eliminated;" and certainly the spasmodic course of bankruptcy legislation in the United States gives colour to this view. Mr. Olmstead, who knows this subject well, goes on to contend that bankruptcy is in reality a "commercial regulation," and its true function collection and distribution of a debtor's assets among his creditors; the relief of the debtor is, he thinks, quite a secondary consideration. Historically, no doubt, this is so. Distribution comes first, from the time when the Roman creditors carved up their debtor among them; and later systems of insolvent administration, if they have not exhibited quite the fine logic of Roman law, have been true to its spirit. A barrister once charged by his circuit with unprofessional conduct in taking a half-guinea fee remarked: "I took all the poor devil had, and I hope you don't call that unprofessional." Insolvent administration also took all the poor debtor had, and more, for it allowed unsatisfied creditors to seize his earnings as fast as he made them. This position of a debtor as a slave working out his debt to his creditors was not an incentive to industry, and the policy of later law, regarding not merely the interests of creditors, but the welfare of the community, has superseded it by the principle of bankruptcy. The debtor gives up all he has and starts a free man—relieved from his incubus of indebtedness, and with a chance of making himself once more a useful and self-supporting citizen. Under this system the key of the situation is the discharge. Laxity in granting it may easily have most mischievous effects; but the wide discretion now given, by English law at least, to the Court to graduate the terms of discharge to meet the circumstances of each case—to take cognisance of offences against the bankruptcy law and to distinguish misfortune from misconduct—constitutes a judicial censorship of the greatest value to commercial morality, and reconciles, as far as is possible, the interests of creditors, of debtors, and of the State.

**Mixed Marriages in Egypt.**—One of the most vexed questions, according to Mr. M'Ilwraith, the Judicial Adviser in Egypt, is the nationality

of a European woman who marries an Ottoman subject. The Mixed Tribunals have decided as regards the French and Italian woman that she retains her nationality, on the ground that according to French and Italian law the woman who marries a foreigner only loses her original nationality if the law of the State of which her husband is a subject confers upon her the nationality of the husband, and that it had not been shown that the Ottoman law did confer the Ottoman nationality on a European woman who married an Ottoman. On the other hand, the French Consular Court has held that a Frenchwoman who marries a Turk becomes a Turkish subject, and this view is likely to prevail. In the case of an Englishwoman the effect of s. 10 of the Naturalisation Act, 1870, is to make her a subject of the State of which her husband is a subject, and the practice of the Consular Courts both in Egypt and Constantinople is to treat such women as Ottoman subjects. This is on the assumption that the marriage is valid; but is it valid? Is the marriage of an Englishwoman with a Mohammedan, whose personal law allows him to have four wives and to divorce all or any of them at a moment's notice, and which is therefore a polygamous or a potentially polygamous union, a Christian marriage as that term is understood in our Courts, "the voluntary union," that is, "for life of one man and one woman to the exclusion of all others"? Mr. Justice Stirling, in the *Baralong* case, held not; but Sir Dennis Fitzpatrick, in his recent article on "Non-Christian Marriage" (Journal, Nos. 7 and 8), seems in favour of the Courts taking such marriages as they find them established by the law under which they were contracted.

**The Sources of Slavonic Law.**—Professor Sigel, of Warsaw, in his Ilchester Lectures delivered at Oxford, lifts the curtain on a national drama too long neglected by jurists—a drama which, in Russia, is even now being unrolled before our eyes. He sketches the development of Slavonic law in Bulgaria, Servia, Russia, Bohemia, Poland, and Croatia. To understand Slavonic organisation we must first, he tells us, know the sources of Slavonic law, and in regard to these he says: "Of the two forms of law, customary and statute, the first prevails throughout all Slavonic history. Even in Russia, where the Statute law is considered from the eighteenth century as almost the only form of law, and in the nineteenth century when the whole law is codified, the great mass of the population, perhaps three-quarters, live according to their old customs and usages preserved only by tradition. The Slavonic law, which is the law of an agricultural people, is in this respect nearer to the English and American law than to the law of Continental Europe, where the customary law is almost entirely replaced by codes, and does not operate even in common intercourse. Therefore the Slavonic law can furnish valuable data for the determination of the great questions on the origin of law from indefinite customs and usages, and on the relation between common law and statute law in the historical development of mankind."

Slavonic law has not such a well-marked individuality as English, French, or German law. The juridical element in the Slavonic world is not completely differentiated from the religious, moral, and political elements. In Russia even at the present time, we may remark, says Professor Sigel, a great prominence of religious ideas. But this defect—from a juridical point of view—is the source of Russia's strength. It makes her "Holy Russia" in the eyes of the Russian people.

**Marriage Law in New Zealand.**—We are indebted to Mr. Trimble, of New Zealand, for full and instructive answers to the series of questions proposed in No. 6 of the Society's Journal, on the law of marriage, so far as his colony is concerned. In the main the marriage law of New Zealand is the same as that of England, but a man may marry his deceased wife's sister; and so far as the Legislature of the colony is concerned, a woman might marry her deceased husband's brother, but the Act legalising it has not yet been sanctioned by Downing Street. There are also statutory provisions regulating Maori and mixed marriages with natives, and marriages of minors without consent of parent or guardian. Marriages of the latter kind are by French law null and void. In England it is different: the clergyman solemnising the marriage exposes himself to penalties; but the marriage stands. "Fieri non debuit, factum valet." In New Zealand the law so far resembles English law that the validity of the marriage is not affected by the want of the parent's or guardian's consent, but the party procuring the marriage does not do so with impunity, as with us. New Zealand law treats the wrong-doer much as our Court of Chancery treats one who has married a ward of Court without consent. The Attorney-General may, at the relation of the aggrieved parent or guardian, sue by information for a forfeiture of all the estate, right, title, and interest in any property which may accrue to the party so offending by reason of such marriage, and the Court may settle it for the benefit of the innocent party or the issue of the marriage so as to prevent the offending party getting any benefit by it. If both parties to the marriage are guilty, the Court may secure the property for the benefit of the issue. With these forfeitures before him, the mercenary suitor will think twice ere he transgresses the law.

**Recent Foreign Legal Literature.**—Mr. Whiteway sends this note as to recent legal publications in France and Germany:—

"The following appear to be the most important French legal treatises that have appeared of late, there being therein included continuations and new editions of such works: Glasson, *Le Parlement de Paris*, 2 vols.; Glasson and Colmet d'Aage, *Précis théor. et prat. de Procédure civile française*, 2 vols.; Marion, *L'Impôt sur le Revenu au XVIII.ème Siècle, principalement en Guyenne* (Picard, Paris). M. Ducrooq has brought out the fourth volume of the seventh edition of his *Cours de Droit administratif et de Législation françaises des Finances*; M. Cesar Bru, the fourth volume of the second

edition of the *Traité théorique et pratique de Procédure de M. Garsonnet*, a work that M. Bru re-edited after the death of the writer. M. Lyon Caen and Renault have brought out the fourth volume of the third edition of their *Traité de Droit commercial*; M. Garraud, the fifth volume of the second edition of his *Traité théorique et pratique du Droit pénal français*; M. L. Say the fourth and last volume of *Les Finances de la France sous la troisième République*; M. Planiol, the third volume of his *Traité élémentaire de Droit civil*; and M. Cuq, the second volume of *Les Institutions juridiques des Romains*. To these may be added the following articles in German and Italian magazines: In the *Zeitschrift für die gesammte Strafrechtswissenschaft*, vol. xx. pp. 385–400, the article 'Friedrich Nietzche als criminaliste'; in Ihering's *Jahrbucher für die Dogmatik der bürgerlichenrechts*, vol. xli. pp. 68–111, the article by L. Jacobs entitled 'Recht, Sitte und Sittlichkeit'; in *Archive Giuridice* of September and October, 1901, an article by Brandileone called 'Studio sulle Svelgimento dei Rapporti Patrimoniali fra Conjugi in Italia.' In the *Savignystiftung*, vol. xxii. (German part) p. 443 (1901), there is also a German translation of 'Political Theories of the Middle Ages,' with an introduction by F. A. Maitland."

**Address to the Colonial Premiers.**—The following is a copy of an address which has been presented, with the approval of the Executive Committee of the Society, to the Colonial Premiers and others, and which may, it is hoped, lead to the Society increasing its sphere of usefulness:—

THE SOCIETY OF COMPARATIVE LEGISLATION.

*Address to the Members of the various Colonial Governments now in England.*

On the occasion of the visit of the representatives of the various colonies of the Empire, at a time when the common interests of all parts of it are under consideration, the Society of Comparative Legislation submits the following facts and proposals in the belief that they may be deemed worthy of the attention of his Majesty's Government and of the Governments of the colonies:—

1. The Society was established in 1894, mainly for the purpose of obtaining and diffusing a knowledge of the course of legislation in different countries, but more particularly in the several parts of his Majesty's dominions and in the United States of America.

2. In a large degree, owing to the friendly co-operation of various Government Departments in England, particularly the Colonial and Foreign Offices, and of the colonial Governments throughout the Empire, the Society has, it is believed, been useful in furthering the object for which it was formed.

3. To name only one thing accomplished: For the first time, owing to the labours of the Society, each member or part of the Empire may now easily ascertain the legislative work and methods of all other parts. The many Statute Books of the Empire have, by means of annual summaries, digests, and indices published by the Society, been made accessible as they never were before. The Society is endeavouring to accomplish a similar work for the legislation of the chief countries of Europe.

4. Recognising the value of the work which the Society has already carried out, and believing it may be made still more useful, especially to the interests of

commerce, the Board of Trade has promised to contribute a sum to the funds of the Society; and it is hoped that the journal of the Society will prove a useful medium of communication as to legal information of interest to men of business throughout the Empire.

5. A further development of the work of the Society is believed to be both practicable and opportune. The Government at home and the colonial Governments might, it is conceived, without incurring any responsibility, direct or indirect, for the action of the Society, and without trenching on the provinces of their official advisers, further aid the Society in performing still more important work.

6. Following the example of the State of New York, which in 1890 passed a Law for the appointment of Commissioners to promote uniformity of legislation in the United States, most of the States of the American Union have appointed Commissions for the promotion of such unity; conventions and conferences attended by such Commissioners have been held; and it is believed that progress has thus been made towards the end in view.

7. In connection with the Ministry of Justice in France there exists a Comité de Législation Etrangère which does useful work in regard to legislation, more especially by putting at the service of the Government information as to measures of a similar character in other countries. A similar service is rendered by the Societé de Législation Comparée.

8. The Society might, it is suggested, be made the nucleus of an organisation performing work akin to that of these bodies which two countries, recognising the need of unity in legislation and the desirableness of profiting by the experience of other countries, have created. The Society might become something more—it might become, in a sense, a legal consultative Council of the Empire.

9. Without endeavouring to forecast all possible directions of activity, it may be suggested that—

(*a*) The Society may form one or more standing committees for the collection and interchange of information in regard to legislation between different parts of the Empire, the United States of America, and other foreign countries.

(*b*) It might aid in assimilating and codifying large parts of the laws of the Empire; in realising, so far as is practicable and desirable, its legal unity, and in forming a *Rechtsverein.*

(*c*) It might help to codify, so far as is practicable, the commercial law of the Empire—to give it that which is possessed by France, Germany, Italy, Holland, and, indeed, by most of the chief States of the world, including some of them with commercial interests far inferior to ours, and to carry out a work which has been more than once declared to be expedient by the United Chambers of Commerce of the Empire.

(*d*) It might give useful assistance in regard to such questions as naturalisation, legal education, enforcement of judgments of colonial Courts, security for costs of British subjects not resident in the United Kingdom, and many questions of private international law.

(*e*) It might confer and advise as to the form and methods of legislation in the United Kingdom, India, and the colonies.

(*f*) It might answer enquiries, or conduct investigations or obtain reports from competent authorities, as to foreign legislation upon questions which occupy the attention of the Imperial Parliament or of colonial legislatures.

(*g*) Lastly, it might represent the scientific spirit, the movement towards unity, in law, never so much needed as in these days, when no one Parliament

can without loss to itself afford to ignore the legislative experiments and experience of others.

10. To accomplish no small part of all this only a trifling expenditure is necessary. So far the work of the Society has been done gratuitously, and there is no intention to change this policy for the additional work here proposed. Probably a contribution of not exceeding £50 to £60 a year from each colony would suffice to meet normal expenditure. What is mainly required is organisation, co-operation, and recognition of the desirableness of the ends which the Society has chiefly in view.

11. It is tentatively suggested that a certain proportion of members of the general Council of the Society should be nominated as follows:—

*In the United Kingdom, by—*

The Lord Chancellor of Great Britain;
The Lord Chief Justice of England;
The Secretary of State for Foreign Affairs;
The Secretary of State for the Colonies;
The Law Officers of the Crown.

The Lord Chancellor of Ireland;
The Lord Chief Justice of Ireland;
The Law Officers of Ireland.

The Lord President of the Court of Session of Scotland;
The Lord Justice Clerk of Scotland;
The Law Officers of Scotland.

*In each of the colonies by*

The Premier;
The Chief Justice;
The Law Officers.

*In India* by—

The Viceroy and his Council.

12. With some such organisation as is here suggested—and it is needless to say that modifications of these proposals are contemplated, and that the details of organisation would require much consideration before any scheme was finally adopted—there would exist all over the Empire local legal councils, together with an Imperial Legal Council, all of them entirely unofficial, the Executive Governments at home and in the colonies being of course in no way bound by, or responsible for, the opinions or action either of the Imperial or of the local councils, each council acting independently, if desirable, and not responsible for the action of other councils; but from time to time all conferring and co-operating, their discussions being fruitful and instructive, their joint representations possessing great moral weight.

13. It is conceived that such a scheme, even if very imperfectly realised, would form an important link in the unity of the Empire.

14. A minor matter may be mentioned. The Society might, it is conceived, also aid in forming what is much needed—a central library containing complete sets of the Statutes and Ordinances of all legislative bodies within the Empire.

15. Such a library, which does not, it is believed, at present exist, would be of great importance and value, not only to lawyers, but to persons concerned with

administration or engaged in business. The absence of such a library and the impossibility of procuring without much delay accurate information as to the Statute law of the Empire are serious anomalies.

16. If each of the colonies supplied a complete set of its own Statutes, the Society would probably find means of housing them in a building which would be conveniently situated, and where they could be readily consulted.

17. The Society would venture to request the various members of all colonial Governments now in this country to take into consideration the above facts and suggestions, and, in the event of their approving generally of the objects in view, to adopt such measures as they deem best fitted to further such objects. The Executive Committee of the Society will be pleased to render any practical aid in their power.

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Yours truly

Harrison